
THE LAW OF EXECUTION
IN
BRITISH INDIA

347.077
K82L

DEPARTMENT OF LAW
LIBRARY
UNIVERSITY OF KASHMIR.

NO 2122 DATE 20/2/2022

CONTENTS

[Vol. II.]

CHAPTER		PAGE
XIV.	Practice in Execution ...	1
XV.	Arrest and Detention ...	42
XVI.	Attachment ...	81
XVII.	Do. (<i>Contd.</i>) ...	174
XVIII.	Claims and Objections ...	258
XIX.	Equitable Execution ...	355
XX.	Sales in Execution ...	407
XXI.	Void and Voidable Sales ...	570
XXII.	Redemption of Sales ...	573
XXIII.	Annulment of Sales ...	610
XXIV.	Auction-Purchaser ...	673
XXV.	Estoppel in Execution ...	780
XXVI.	Wrongful Execution ...	817
XXVII.	Termination of Execution ...	837

INDEX OF STATUTES

	Page.
13 Edw. I. c. 18 (Execution for fisa or elefit) ...	43
13 Edw. III. c. 17 ...	43
29 & 30 Vic. c. 109 ...	71
30 & 31 Vic. c. 127 (Railway Company Act) ...	102
52 Hen. III. c. 23 ...	43
29 Car. II. c. 7 (Statute of Frauds, 1677) ...	52
7 Anne c. 12 (Diplomatic Privileges Act, 1709) ...	69
1 & 2 Vic. c. 110 (Judgments Act, 1838) ...	347
2 & 3 Vic. c. 11 ...	766
11 & 12 Vic. c. 21 ...	85
17 & 18 Vic. c. 104 (Merchant Shipping Act, 1854) ...	162
23 & 24 Vic. c. 115 ...	766
24 & 25 Vic. c. 100 (Offences against person Act, 1861) ...	71
36 & 37 Vic. c. 66 (Supreme Court of Judicature Act, 1873) ...	356
44 & 45 Vic. c. 58 (Army Act, 1881) ...	71, 152, 187
47 & 48 Vic. c. 68 (Matrimonial Clauses Act, 1884). ...	32
53 & 54 Vic. c. 39 (Partnership Act, 1890) ...	405
57 & 58 Vic. c. 60 (Merchant Shipping Act, 1894). ...	162
5 & 6 Geo. V. c. 61 (Government of India Act, 1915) ...	70
Act I of 1859	
S. 73 ...	162
S. 243 ...	361
S. 259 ...	555
Act XXI of 1863 ...	173
Act X of 1862 ...	105
Act V of 1869 ...	152
Act XXIII of 1861 ...	148
of 1877 (Indian Registration Act) ...	504
Ss, ...	17, 89

ii *THE LAW OF EXECUTION*

			Page
Act I of 1872 (Indian Evidence Act)			
Ss. 40-44	...	...	780
Ss. 115-117	...	...	781
Act IX of 1872 (Indian Contract Act)			
S. 69	...	...	459, 603
S. 70	...	...	603
S. 77	...	...	407
S. 78	...	...	407
S. 100	...	...	100
Act IV of 1882 (Transfer of Property Act)			
S. 6	...	...	121, 166
S. 43	...	...	409
S. 51	...	...	412
S. 52	...	...	762
S. 53	...	...	766
S. 54	...	...	123, 407
S. 55	...	...	411
S. 111	...	...	143
Act XIV of 1882 (C. P. Code)			
S. 230	...	...	2
S. 235	...	...	3
S. 236	...	...	3
S. 237	...	...	5
S. 238	...	...	5
S. 243	...	...	15
S. 245	...	...	7, 14, 68
S. 248	...	...	11, 540
S. 249	...	...	11
S. 250	...	...	12
S. 251	...	...	12
S. 254	...	...	21
S. 255	...	...	175
S. 259	...	...	25
S. 260	...	...	26, 68, 185
S. 261	...	...	33
S. 262	...	...	33
S. 263	...	...	36, 879
S. 264	..	...	36, 880

INDEX OF STATUTES

iii

Act XIV of 1882 (C. P. Code)	Page
S. 266	87
S. 268	185
S. 269	176
S. 270	191
S. 272	188, 259
S. 273	189
S. 274	191
S. 275	192
S. 276	212
S. 277	192
S. 278	269
S. 279	269
S. 280	269
S. 281	270
S. 282	270
S. 283	270
S. 284	416
S. 285	260
S. 287	419
S. 289	419
S. 290	456
S. 291	459
S. 293	472
S. 295	851
S. 297	426
S. 298	426, 878
Ss. 299-302	877
S. 302	878
S. 304	416
S. 306	463
S. 307	467
S. 310 A	575
S. 311	610
S. 312	481, 48
S. 315	676
S. 316	499, 769
S. 317	768, 769

Act XIV of 1882 (C. P. Code)			Page
S. 318	...	...	881
S. 319	...	...	881
S. 320	...	...	377
S. 321	...	...	381
S. 322	...	...	382
S. 322 A	...	...	383
S. 322 B	...	...	384
S. 322 C	...	...	384
S. 322 D	...	...	385
S. 323	...	...	386
S. 324	...	...	387
S. 324 A	...	...	389
S. 325	...	...	389
S. 325 A	...	...	390
S. 325 B & C	...	...	390
S. 326	...	...	380
Ss. 328-330	...	...	894, 895
Ss. 332-335	...	...	896
S. 336	...	...	61
S. 337	...	...	45, 48
S. 337 A	...	...	60
S. 338	...	...	63
S. 339	...	...	64
S. 340	...	...	664
S. 342	...	...	65
S. 427	...	...	28
S. 433	...	...	69
S. 438	...	...	68
S. 640	...	...	68
S. 642	...	...	71
S. 648	...	...	246
S. 653	...	...	58
Act XIII of 1887	...	...	131
Act IX of 1890	...	...	102
Act IX of 1897	...	...	157

INDEX OF STATUTES

v

Act II of 1899 (Indian Stamp Act)				Page
S. 10	...	...	...	501
S. 35	...	...	...	502
Art. 23	...	...	...	501
Act V of 1908 (C. P. Code)				
S. 2 (13)	...	...	...	182
S. 11	...	...	282, 780,	782
S. 12-14	...	...	...	780
S. 46	...	...	...	19
S. 47	...	...	...	258
S. 48	...	...	...	216
S. 51	...	...	...	68
S. 55	...	...	48, 68, 61,	852
S. 58	...	...	...	65
S. 59	...	...	...	88
S. 60	...	...	...	87
S. 65	...	...	...	509
S. 66	...	...	509,	767
S. 70	...	...	...	377
S. 71	...	...	...	377
S. 72	...	...	...	380
S. 73	...	...	843,	868
S. 86	...	...	...	69
S. 95	...	...	...	820
S. 132	...	...	...	68
S. 135	...	...	...	71
S. 136	...	...	...	246
O. 2	r. 2	..	...	39
O. 9		...	...	40
O. 20	r. 12	...	...	175
O. 21	r. 1	...	...	837
	r. 2	...	...	839
	r. 10	...	...	2
	r. 11	...	...	3
	r. 12	...	...	6
	r. 13	...	...	5
	r. 14	...	...	5
	r. 16	...	...	539

vi *THE LAW OF EXECUTION*

Act V of 1908 (C. P. Code)			Page
O. 21	r. 17	...	7
	r. 22	...	11, 539, 791
	r. 23	...	11
	r. 24	...	12
	r. 25	...	15
	r. 28	...	878
	r. 30	...	21
	r. 31	...	24, 681
	r. 32	...	26, 552
	r. 33	...	31
	r. 34	...	33
	r. 35	...	36, 879, 883
	r. 36	...	36
	r. 37	...	44
	r. 38	...	45
	r. 39	...	64, 880
	r. 40	...	60
	r. 42	...	175
	r. 43	...	176, 856
	r. 43 A	...	171
	r. 43 B	...	171
	r. 44	...	183
	r. 45	...	184
	r. 45 A	...	184
	r. 45 B	...	184
	r. 46	...	185, 285, 854
	r. 47	...	185
	r. 48	...	187
	r. 49	...	405, 102
	r. 50	...	192
	r. 51	...	191
	r. 52	...	188, 259, 398, 855
	r. 53	...	121, 189, 210, 855
	r. 54	...	191
	r. 55	...	192, 216
	r. 56	...	192
	r. 57	...	194

INDEX OF STATUTES

vii

Act V of 1908 (C. P. Code)			Page
O. 21	r. 58	...	... 269
	r. 59	...	... 269
	r. 60	...	... 269
	r. 61	...	... 270
	r. 62	...	270, 802
	r. 63	...	... 270
	r. 64	...	... 416
	r. 65	...	... 856
	r. 66	...	552, 802
	r. 67	...	419, 552
	r. 68	...	... 456
	r. 69	...	456, 855
	r. 71	...	472, 674
	r. 72	...	... 675
	r. 74	...	... 461
	r. 75	...	... 461
	r. 76	...	... 461
	r. 77	...	... 426
	r. 78	...	.. 426
	r. 79	...	... 877
	r. 80	...	... 877
	r. 81	...	... 878
	r. 82	...	... 416
	r. 84	...	463, 673, 557
	r. 85	...	467, 673
	r. 86	...	... 674
	r. 89	...	... 575
	r. 92	...	481, 487
	r. 93	...	... 677
	r. 94	...	499, 684
	r. 95	...	... 881
	r. 96	...	... 881
	r. 97	...	... 894
	r. 98	...	... 895
	rr. 100-102	...	... 896
O. 22	...	...	... 40
O. 23	...	...	... 40

Act V of 1908 (C. P. Code)			Page
O. 32	...	...	561
O. 34	r. 14	...	555, 665
O. 38	r. 2	...	855
O. 39	r. 1	...	856
O. 40	r. 2	...	373
	rr. 3, 4	...	374
O. 43	r. 1	...	375
Sch. III, Par.	1	...	381
	2	...	382
	3	...	383
	4	...	384
	5	...	384
	6	...	385
	7	...	386
	8	...	387
	9	...	389
	10	...	389
	11	...	390
	12, 13	...	390
Act IX of 1908 (Indian Limitation Act)			
Art. 11	...	...	333
Art. 11-A		...	907
Art. 12	...	...	660
Art. 13		...	868
Art. 29		...	833
Art. 36		...	832
Art. 39	...	...	832
Art. 49	...	...	833
Art. 62	...	...	868
Art. 120	...	...	677
Art. 136	...	...	910
Art. 137	...	...	908, 909
Art. 138	...	...	908
Art. 139		...	910
Art. 142	...	...	884
Art. 144	...	...	884, 910
Art. 165	...	...	908

INDEX OF STATUTES

ix

	Page
Act IX of 1908 (Indian Limitation Act)	
Art. 166 	653
Art. 167 	907
Art. 174 	841
Art. 180 	905
Art. 181 	653, 891
Act VII of 1913 (Indian Companies Act)	
S. 234 	165
Act VIII of 1923 (Workmen's Compensation Act)	
S. 9 	163
Bengal Act VIII of 1865	231
S. 148 	
I of 1905 	394
Madras Act III of 1893	131
I of 1900 	726
I of 1902 	394
I of 1908 	726
Punjab Act II of 1903	394
U. P. Act IV of 1998	394
II of 1901 	726

TABLE OF CASES CITED

A		Page		Page
Aba v. Dhondubai	551, 622		Abdul Rahman v. Mahijar	579
Abadi v. Muhammad	.. 788		Abdul Rahman v. Promode Behari	.. 579
Abbott v. Abbott	.. 106		Abdul Rahman v. Sarafat	669
Abdool v. Dataram	.. 714		Abdul Rahiman v. Mahomed	60
Abdool Lateef v. Jadub Chandra Kondaji	.. 587		Abdul Rashid v. Goppo Lal	214, 217
Abdul v. Goolam	165, 441		Abdul Salam v. Wilayat	91, 165
Abdul v. Macrase	.. 622		Abdul Samad v. Basirundin	565
Abdul v. Mateyar	.. 580		Abdul Wahid v. Shaluki Bibi	.. 606
Abdul Aziz v. Sarat Dayal	104		Abdulla v. Kanhaya	.. 797
Abdul Aziz v. Appayasami	703		Abdulla Khan v. Jalam Singh	.. 777
Abdulla v. Doctor Oosman	860		Abdulla Koya v. Kallumpurath Kanaram	.. 589
Abdul Aziz v. Tafajuddin	.. 617		Abdur Rahman v. Babu Har Narain Das	.. 635
Abdul Gafur v. Albyn	.. 187		Abdur Rahman v. Krishna Mal	.. 156
Abdul Gani v. Dunne	.. 616		Abdur Rahman v. Shaukar	551, 622
Abdul Hadi v. Mt. Kabultunnissa	.. 514		Abhoy Churn v. Golam Ali	646
Abdul Hakim v. Nga Ni-ri	458		Abidunnissa v. Amirunnissa	796
Abdul Hakim v. Ulfat Husain	.. 193		Abinash v. Ananda	.. 13
Abdul Hamid v. Mohamed Sharif	.. 775		Abool v. Shib Doolaree	.. 629
Abdul Hye v. Macre	.. 620		Absa Beeni v. Moidinsa	.. 521
Abdul Majid v. Abdul Majid	718		Abuttusan v. Ramzan	.. 714
Abdul Huq v. Mohini Mohun	.. 613		Achchaibar v. Tapasi	772, 773,
Abdul Jabar v. Shaikh Karim	63		Achhan v. Thakur Dus	.. 164
Abdul Kadir v. Alimia	339, 341		Achuta v. Kali	.. 139
Abdul Kadir v. Somasundaran	.. 274, 302		Achuta v. Mammavu	295, 328
Abdul Karim v. Bullen	.. 12		Adhar v. Manmotha Nath	635
—v. Choudhri Ram	.. 40		Addar Chunder v. Aghore Nath	127, 506, 509
Abdul Karim v. Islamunnissa	.. 908		Adil Khan v. Mirza Mohammad	.. 551
Abdul Karim v. Thakurdas	261, 263, 526, 527		Adjoodhya v. Middleton	.. 163
Abdul Khader v. Ali Mean	337		Adjoodhya v. Sheodass	.. 335
Abdul Lateef v. Doutre	128, 170		Administrator-General of Bengal v. Aghorenath	.. 676
Abdul Musoor v. Abdul Hamid	664, 666		Administrator-General v. Prem Lal	.. 171
Abdul Nasar v. Lalita Prasad	601		Afatcolla v. Dwarknath	.. 714
Abdul Nossia v. Doolal	.. 618		Afzal v. Ram Kumar	.. 139
Abdul Rafi Khan v. Maula Baksh	.. 6		Afzal Ali v. Amar Ali	.. 655
Abdul Rahim v. Sital Prasad	831		Agabeg v. Sundari	.. 375
Abdul Rahman v. Amin	.. 204, 240		Aga Kurhcolie Mahomed v. Reg	.. 55

	Page		Page
Agarchand v. Chajjoolal ..	242	Alimonneesa v. Shamacharn	708
Agarchand v. Rakhma	6, 805	Alimooddy v. Chunder Nath	622
Ahirin Begam v. Agha Ali	627	Ali Muhammad v. Ali Khanum	558, 669
Ahmadi v. Amanat ..	29	Ali Muhammad v. S. C. Chunder	.. 137
Ahmaduddin v. Majlis	106, 139	Alimuddin v. Naubat Rai	488
Ahmad Jan v. Kishen Chand	283	Ali Saheb v. Kaji Ahmed	122, 713, 799
Ahmad Jan v. Singer Sewing Machine Co.,	.. 100	Alkeshi Dasi v. Biraj Mohini	627
Ahmad-ud-din v. Malji Rai	165	Alliar Rcwther v. Narayana Kudumban	.. 656
Ahmed v. Lalta	465, 623	Alleyne v. Darcey	.. 92
Ahmed v. Maung Shwe	.. 568	Alokeshi v. Biriaj	639, 650
Ahmed v. Poker	.. 26	Alukmonee Dabee v. Banee Madhub	.. 409
Ahmed v. Thomas	.. 344	Aiwar Chetty v. Povala Varadappa Naicker	.. 199
Ahmed Ally v. Maung Shwe Thin	.. 661	Alwar Iyengar v. Zelleveger	298
Ahmid Yar Khan v. Dinanath	.. 660	Amanat Khan v. Miyan Khan	.. 515
Ahmud v. Mahomed	.. 198	Amara v. Annamalai	.. 855
Aghorenath v. Ram Churn	444, 771	Amba v. Baijnath	.. 853
Aghorenath v. Shamasuudari	262, 520	Ambica Charan v. Esmail	.. 638
Aiyanachariar v. Vathiar Ramanuja Aiyangar	.. 29	Ambikamoni v. Khettra Ghosai	.. 669
Aiya Nadar v. Tenammal	.. 364	Ambika Prasad v. Jhinak Singh	.. 515
Ajibal Narasimha v. Shirckoli Temapa	.. 309	Ambika Prasad v. R. H. White-well	.. 641
Ajiuddin v. Khoda Bux	.. 634	American Baptist Foreign Mission Society v. Amalanadhuni	.. 515
Ajoodhia v. Sheo Pershad	5	Amir Ali v. Gopal Das	.. 787
Ajinasi v. Suraj	.. 32	Amir Baksha v. Venkatachala	.. 478
Ajudhia v. Gopinath	.. 429	Amir Begam v. Bank of Upper India Ltd.	464, 557, 645
Ajudhia Prasad v. Nand Lal	611	Amir Bibi v. Noor Mahomed	32
Akbar v. Alia	.. 807	Amir Dulhin v. Administrator General	.. 623
Akhe Ram v. Nand Kishore	694	Amir Kazim v. Darbari	.. 509
Akhil Pradhan v. Manmathanath	.. 777	Amnabibi v. Najmunissa	146, 148
Akhtar Husain v. Qudrat Ali	204	Amolak v. Mahipat	.. 241
Aktar Beg v. Haqnawaz	.. 138	Amrit v. Gunda	.. 488
Alagappa v. Kanakasabai	26, 35	Amrita v. Pandarinath	280, 290
Alagappa v. Sarathambal	.. 62	Amritlal v. Anukul	.. 209
Alagappa v. Sivarama Sundara	.. 143	Amrit Lal v. Jagatchandra	628, 879
Alagirisami v. Ramanathan	444	Amrit Lal v. Murlidhar	.. 524
Alai v. Venga Chetty	.. 679	Amrit Narayan v. Gaya Singh	.. 164
Alam Din v. Allah Din	.. 662	Amriaz Ali v. Bishambar Das	.. 218
Alayakkammal v. Arunachala	456, 787	Ananda Mohan v. Gour Mohan	164, 566
Albert v. Singer Sewing Machine Co.	.. 100		
Aldwall v. Ilahi Baksh	.. 769		
Alen Mahomed v. S. C. Chunder	.. 141		
Alexander v. Mathuradas	.. 331		
Ali v. Ali	.. 465		
Ali Abbas v. Narain Dass	.. 625		
Ali Ahmad Khan v. Bansidar	203, 217, 633		

TABLE OF CASES CITED

xiii

	Page		Page
Ananda Prasad v. Prasanna Moyi ..	661	Arumalla China Subba Reddi v. Vasireddi Jayaramayya ..	579
Anandi v. Ram Niranjana ..	352	Arunachala v. Venkatarama ..	22
Anandi Bai v. Rajaram ..	164	Arunachellam v. Arunachellam ..	628, 630, 640, 808
Anandlal v. R. ..	13	Arunachellam v. Hajee Sheik Meera ..	849
Anandram v. Nityananda ..	540	Arunachallam v. Ramandhan ..	521
Anandray v. Shekh ..	477	Arunachallam Chetty v. Periasami ..	241
Ananta Lakshmi v. Sankaran Nair ..	126, 585	Arunachalan v. Mantha ..	203
Anantha Lakshmi v. Kumara ..	596	Arunachalan Chetty v. Periasami Servai ..	273
Ananthalakshmi v. Kunnan Chankarath ..	602	Arunachellam v. Somasundaram ..	112, 175, 220, 450
Anant Ram v. Damodar ..	309, 310, 315	Arunagiri v. Uthando ..	491
Anantha Bhatte v. Anantha Bhatte ..	139	Arup Chand v. Mt. Karval Chand ..	633
Anantharama Iyer v. Vellath Kuttimalu ..	636	Asa Beevi v. Karuppan Chetty ..	165
Andanapa v. Bhimrao ..	234, 850	Asad Ali v. Haider Ali ..	370
Andrews v. Saunderson ..	83	Asanund v. Jhangiram ..	486
Andrews v. Walton ..	57	Asgar v. Troilokyanath ..	7
Angell v. Draper ..	356	Ashfaq Hussain v. Syed Nazir ..	769
Anglo-Italian Bank v. Davies ..	356	Ashmatullah v. Ram Mahomed ..	136
Annada Krishna Dey v. Jogendra Nath Dey ..	520	Ashruf v. Nethal ..	600
Annada Prasad v. Upendra ..	518	Ashutosh v. Behari Lal ..	557, 639
Annaji v. Chandra ..	128	Ashutosh v. Durgachurn ..	140
Annamalai v. Palamalai ..	215, 221	Ashutosh Chatterjee v. Sudhindra Chandra ..	437
Anrata v. Pandarinath ..	271	Asimuddin Sheik v. Sundari Bibi ..	601
Anthaya Hegade v. Manjappa Setty ..	218	Aslatt v. Corporation of Southampton ..	362, 363
Antoo v. Ardeshir ..	128, 165	Asmatunnessa v. Harmora Lal ..	802
Anund Lal v. Jullodhur ..	215, 217	Asmuthunissa v. Ashruff Ali ..	613, 614, 629
Appai Rukmini Ammal v. Kattuvowu Narasimha Iyer ..	727	Asna Bibi v. Jaigunnissa Bibi ..	305
Appana v. Tangamma ..	130	Assad Ali v. Bujrus Meher Bibi ..	769
Appasami v. Sundaram ..	791	Assadali v. Mahomed ..	363
Appayya v. Kamhali ..	581	Assa Debi v. Bashi Ram ..	710
Appaya v. Kunhati Beari ..	126, 580	Assan Mahamad v. Kadersa Rowther ..	828
Arakel Kunhi Kuttialy v. Imbichi Ammal ..	316	Asuane v. Koorban ..	467
Archer v. Archer ..	397	Atab Pramanik v. Arif Tarafdar ..	805
Arimuthu v. Viyapuri ..	523, 850, 856, 857	Atar Singh v. Lajpat Bai ..	484
Arjan Singh v. Gaman ..	62	Atchayya v. Bangarayya ..	265, 793
Arjun v. Jadunath ..	579	Athappa v. Ramakrishna ..	228, 611, 617
Arjun v. Krishnaji ..	379	Atmaram v. Balakrishna ..	237
Arjun v. R. ..	27	Atma Ram v. Bila Ganpat ..	520
Arjuna Reddi v. Venkatachari ..	639, 665		
Armugan v. Kadir Mohideen ..	827		
Arukasthanath v. Pasambath ..	64		
Arulappa v. Murugappa ..	709		

	Page		Page
Atmaram v. Gulab ..	463	Badri Prasad v. Muhammad Yusuf ..	293, 295
Atmasingh v. Dunichand ..	588	Badri Prasad v. Saran Lal ..	520
Atmolaksao v. Eknath ..	132	Badri Singh v. Tulsi Ram ..	441
Attadies v. R. M. K. Chetty ..	597	Bahadur v. Virod ..	61
Attar Singh v. Bhagwan ..	134	Bahauddin v. Moti ..	147
Attar Singh v. Ghulam Muhammad ..	175	Bahvant v. Babai ..	907
Attavulla v. Geuse ..	147	Bai Anthi v. Modhav ..	378, 672
Aubhoya Dassi v. Pudmo Dochun ..	486, 614	Baidyanath v. Prabhabati ..	622, 636
Aulad Ali v. Abdul Hamid ..	578	Baijnath v. Bishen Devi ..	770, 773
Aunath v. Bishtu ..	806	Baijnath v. Halloway ..	16
Austin v. Debnam ..	819	Baijnath v. Hari Prasad ..	787
Autar v. Sheo Piary Lal ..	587	Baij Nath v. Maharaja Sir Ravaneshwar Prasad ..	631
Autin v. Ahmed ..	93	Baijnath v. Moheep Naran ..	475, 478
Avadbut v. Punjabi ..	340	Baijnath v. Narendra ..	696
Ayodhya v. Nand Lal ..	228	Baijnath v. Radha Rawan ..	519
Ayya Pattar v. Attupurath Manakkal ..	301	Baijnath v. Ram Doss ..	869
Ayyavayar v. Virasami ..	105, 152	Baijnath v. Ramgut Singh ..	667
Azgar Ali v. Asaboddin ..	614	Baijnath v. Ravaneshwar Prasad ..	516
Azim Khan v. Karim ..	661	Baijnath v. Sia Ram ..	557
Azimuddin v. Baldoe ..	671	Baikunti Misser v. Narindra Sundari ..	499
Aziz v. Mohun ..	805	Bailur Krishna v. Lakshmana ..	295, 323, 332, 333
Aziz Bux v. Kaniz Fatima Bibi ..	194, 203	Bai Parvathi v. Mansukh Jetha ..	32
Azizanesa v. Dwarika Prasad ..	657	Bajrang v. Mt. Sonejhari ..	626, 656
B			
Babaji Vithal Savant v. Kaji Abdul Rahiman ..	312	Bakar v. Udit Narain ..	4
Baboo Luchmeepat v. Lekraj ..	461	Baker v. Davenport ..	56
Baboo Suraj v. Sree Kishen ..	475	Bakoo Jodoonath v. Radhamonee ..	661
Babu v. Ramoji ..	164	Baksh v. Lalta Prasad ..	557
Babu Bishen Mohun v. Narayan Prasad ..	860, 864, 866	Bala Gauri Vallabha Devar v. Periasami Udayar ..	339
Babu Das v. Girish Chandra ..	785	Balaji v. Dajiba ..	408
Babu Das v. Muhammad ..	624, 654	Balaji Vithoba v. Bal Krishna Raoji ..	514
Babu Jadunath Singh v. Babu Manohar Lal ..	520	Balakrishna v. Govinda Rao ..	148
Babu Jugal Kishore v. Bachinder Mohan ..	602, 637	Balamba v. Krishnayya ..	117
Babu Mahendranath v. Jadunath ..	689	Balamukand v. Madan Chotia ..	140
Baburam v. Dakhina ..	500, 777, 779	Bala Preshad v. Sujan ..	803
Baburam v. Ramashai ..	578	Balaram Mulick v. Solano ..	246
Babu Sitapat Ram v. Mahabir Prasad ..	618	Balaram Pal v. Kanysha ..	515
Bachni v. Charuchander ..	455	Balasubramania v. Swarmamal ..	39
Backhouse v. Siddle ..	208	Balasundaram v. Krishna Aiyar ..	100
Badam Kumar Dasi v. Hari Dasi ..	719	Baldeo v. Esshiar Singh ..	718
Badeley v. Consolidated Bank ..	112, 206	Baldeo v. Meghu Singh ..	656
		Baldeo Das v. Meshrbai Ali ..	220

TABLE OF CASES CITED

xv

	Page		Page
Baldeo Pershad v. Parichat	215, 243	Bapu v. Lakshuman	332
Baldeo Singh v. Kishon Lal	485	Barada Kanta Raya v. Shaikh Majuddi	252
Baldev v. Ramachandra	119	Barendranath v. Martin & Co.	215, 849, 864
Balgauda v. Mallappa	490	Barhamdeo v. Ramnarain	686
Baliram v. Narsingdas	617	Barhma Din v. Baji Lal	190, 211
Bali Ram v. Seth Narsingdas	428	Barkat Rai v. Misri Khan	380
Balkishen v. Narain Das	262	Barker v. St. Quintin	818
Bal Kishan Lal v. Topeswar	513, 518, 519	Barlett v. Stinton	818
Balkrishna v. Govind Rao	148	Barnett v. Eastman	107
Balkrishna v. Shiva China	790	Baroda Kanta v. Chunder Kanta	416, 634
Ballam Das v. Amar Raj	720	Baroda Sundari v. Fergusson	197
Balli Singh v. Bindeswari	716	Barrack v. Newton	46
Balls v. Thick	82, 83, 94	Barton v. Brigo Nath	694
Bally v. Ganel	170	Basal Mal v. Tajammal	92
Balmakund v. Ashfaq	785	Basan gowda v. Irgawdati	168
Bal Makund v. Maqsud Ali	299, 300	Rasanta Kumar v. Ram Kanai	617, 642
Balmukundas v. Moti Narayan	712	Basant v. Kananji	290
Balu v. Raghubar	261	Basant Lal v. Saiyad Husain	435
Baluk v. Nimaye	684, 694	Basant Singh v. Asa Ram	147
Balwant Dass v. Umabai Shankar Rao	391	Basappa v. Dandayya	484, 570
Balwant Rao v. Muhammad Hussain	532, 536, 661	Basapa v. Marya	507
Balwant v. Ratanlal	615	Basavayya v. Syed Abbas	271
Balwant v. Secretary of State	147	Basdeo v. Joha Smidt	4
Balwant Singh v. Mahindar Singh	394	Bash Arutulla v. Uma Charun	554
Bama Charan v. Bagala Charan	339	Basheshar Dayal v. Hargobind	588
Bamandas v. Hirachand	724	Bashi Chunder v. Enayat	799
Bama Sundari v. Adhar Chunder	331	Bashi Ram v. Hossan	590, 656
Banarsi Das v. Ramzan	39	Bashiruddin v. Jori	601
Banda Gurbaksh v. Ghulam	132	Basi v. Ram Krishna	577
Bandhulalli v. Lagin	128	Basiram v. Kattyayani	563
Bandi Bibi v. Kalka	489, 672	Basiruddi v. Kalas	552
Bank of Bengal v. Akhoy Kumar	676	Basiruddin v. Faimulla	600
Bank of Upper India v. Sheo Prasad	196, 203, 218	Basso v. Mir Muhammad	801
Banka Behari v. Qurer Das	647	Basti Ram v. Fattu	651
Banke Lal v. Jagatnarain	127, 506, 509, 621	Basvantapa v. Ranu	544, 568
Banno Bibi v. Jasoda Kuar	488	Basvantappa v. Shidappa	331
Bansidhar v. Gulab Kuar	486, 487	Butuk Nath v. Bepin Behari	606
Bansidhar v. Sham Lall	268	Bawandas v. Banwaridas	148
Bansilal v. Sitaram	220, 391	Beard v. Samuel	150
Bansi Ram v. Narasingha	89, 146, 147	Beasley v. Roney	112
Banuddin v. Arunachela Mudali	241	Bebee Tokai v. Davod	106, 164
Bapineedu v. Venkayya	212, 213	Begam v. Muhammad	124
		Begg Dunlop and Co. v. Jagannath	244, 248, 249
		Behari v. Mukat Singh	640, 737
		Behari v. Sanbhuchandra	577
		Behari Lall v. Gopal	597
		Behari Lal v. Majid Ali	789
		Bejoy v. Dharendra	429
		Bejoy Chand v. Sahashi Bhushan	716

	Page		Page
Bejoy Singh v. Hukum Chand	611	Bhagwant Prasad v. Dwarka Prasad	49
Belcher v. Patten	93	Bhagwant Singh v. Bholi Singh	909
Bell v. Denver	173	Bhagwati v. Banvari	601
Benaris Das v. Gopal Chand	866	Bhagwati v. Mukand	618, 673
Bence v. Shearman	112	Bhaickand v. Ranchhodhas	639
Beni Madho v. Pransingh	370	Bhai Khan v. Des Raj	248
Beni Prasad v. Mukhtesar	517	Bhaimia v. Kadir	60
Beniram v. Nanhee	787	Bhairabchandra v. Nandiram	369
Benode Behari v. Ramsarup	636	Bhairan v. Rajanta	293
Benode Lall v. Gircedhur	280	Bhairan Raj v. Saran Raj	882
Benodi Lal v. Tamizuddin	507	Bhaiyalal v. Ballabhabhas	135
Benodini v. Peary Mohan	577, 614	Bhaji Bhimji v. Administrator-General of Bombay	288
Bepeen v. Pureshnath	464	Bhanji Singh v. Bbagawati Prasad	515
Bepin Behari v. Haricharan	679	Bhanabhai v. Cholabhai	60
Bepin Behari v. Shashi Bhushan	538, 577, 663	Bhan Singh v. Prithami Chand	491, 657
Bepin Bihari v. Kanti Chandra	542, 626	Bhargava Commercial Bank v. Mackinnon & Co.	88
Bepin Behary v. Jotindar	458	Bhaskar v. Shudhar	44
Beepin v. Purreshnath	477	Bhau v. Dadi Krishnaji	882
Berhamdeo v. Saliq Ram	622	Bhaurao v. Lahanu	394
Besheshwar v. Rup Kishore	786	Bhawani v. Mathura Prasad	127, 716
Beti v. Collector of Etawah	208	Bhawani Koer v. Afzal Husain	539, 663
Bhabhuti Rai v. Harbans Rai	724	Bhawani Koer v. Mathura Prasad	506, 607
Bhadai v. Manowar	517	Bhawani Kuar v. Gulab Rai	417
Bhadra v. Gunamoni	604	Bhawani Kumar v. Matura Prasad	126, 714, 716
Bhadrappa v. Jaggaraju	787	Bhawani Prasad v. Kallu	719
Bhadreswar v. Bishun Charan	636, 637	Bheemacharlu v. Donti Murti	827
Bhagat Ram v. Mangat Ram	867	Bhikam Khan v. Dan Singh	40
Bhagat Singh v. Dam Prakash	710	Bhikari Misra v. Ravi Surja Mooi	457, 620, 632
Bhagchand v. Mt. Jhunia	278	Bhikkar Gir v. Jalpadat	634
Bhagmal v. Sita Ram	909	Bhikka v. Sakarlal	298, 301
Bhagvandas v. Hathibhai	87	Bhiku Lal v. Khemchand	428
Bhagvut v. Narku	455	Bhimoldas v. Ganesha	550, 916
Bhagwan v. Kanshi	353	Bhimappa v. Irappa	295, 333
Bhagwan v. Param	518	Bhimdas v. Upendramohan	162
Bhagwan Chandra v. Chandra Mala Gupta	264	Bhim Singh v. Sarwan	464, 465, 467, 488, 558, 652
Bhagwandas v. Abdul Husain	III, 112	Bhiram v. Gopi Kanth	454
Bhagwan Das v. Ahmad Jan	219, 421, 428	Bhiwa Jotiba v. Devchand	570
Bhagwan Das v. Baijnath	290	Bhoitarinec v. Nilmonce	280
Bhagwandas v. Hathibhai	136, 567	Bhola Jha v. Kali Prasad	556, 666, 669
Bhagwan Das v. Suraj Prasad	489	Bholanath v. Buskin	883
Bhagwandas v. Tarachand	805	Bholanath v. Maqbul-un-missa	863
Bhagwan Kuar v. Harnem Kuar	727		
Bhagwan Lal v. Rajendra Prasad	201		
Bhagwant v. Kedari	341		

	Page		Page
Bholanath v. Mt. Kishori	87, 566, 567	Bindubashini v. Harendra Lal	604
Bholanath v. Prafullanath	785	Bindu Bashini v. Keshab	783, 786
Bhoobun v. Govind	25	Bindubasini v. Srimanta	268
Bhooban Mohun v. Nobin	30	Bipin Behari v. Jatindranath	619
Bhowani Kunwar v. Mathura		Bipin Behari v. Kantichandra	620
Trasad	126	Bipro Pratap v. Lenarain	137
Bhoynub v. Madhub	105, 149	Biraik Beniamma v. Syd Shum-	
Bhoza Rugbbur Singh v. Bhoza		suddin	39
Raj Sing	25	Biram v. Gopikanth	128
Bhuban Behari v. Dhirendranath	637	Bird v. Bass	82
Bhubanesuar v. Tilakdhari	602, 637	Bird v. Jones	825
Bhuban Mohun v. Girish		Birendra v. Martin & Co	858
Narain	667	Birj Mohun v. Rai Umanath	487, 491, 645 659
Bhuben Behari v. Dhirendra	638	Birju v. Mahammad	241
Bhubon v. Nueda Lal	635	Bishambar v. Imdal Ali	146
Bhuggobutty v. Shamachurn	128	Bishambhar Nath v. Gaddar	832
Bhuawan Chunder v. Chundera		Bishambhar Nath v. Girdhari	
Mala	241	Lal	212
Bhukhan v. Bhaiji	694	Bishan v. Ghaziuddin	770, 775
Bhulu Beg v. Jatindranath	888	Bishen Chand v. Nadir Hossain	88
Bhura Mal v. Har Kishan	517	Bishen Chunder v. Monmohinee	851
Bhurchand Hanoraj v. Vira		Bishen Das v. Jiwa Ram	61
Champa	387	Bishenmun v. Land Mortgage	
Bhuria v. Baliram	218	Bank	232
Bhuroonissa v. Kureemoonissa	344	Bishesar v. Ambika Prasad	849
Bhusan Chandra v. Narenranath	831, 832	Bishesur v. Hari Singh	487, 613
Bhyrub v. Saudaminee	506	Bishesur v. Hari	613
Bibi Aliman v. Dakeeseshwar		Bishokhamoyee v. Sonatun	475
Prasad	293, 300, 328	Bishun Dayal v. Jagdish	579
Bibijan v. Sachi	459	Bisram v. Sahib Unnissa	622
Bibi Miyakhan v. Gulab Chand	212	Bissesur v. Doolarchand	684
Bibi Sharofan v. Mahomad	486	Bissicks v. Bath Colliery Co.	82
Bicoobai v. Hariba	605	Bissonath v. Komalashwari	
Bihari Lal v. Gopal Lal	855	Prasad	636
Bijiraj Boyee v. Raja Bijoy	688	Biswanath v. Lingaraj	280
Bijoy Singh v. Hukum Chand	612	Bisweswara Ram v. Faltu Ram	32
Bikchand v. Sajandas	185	Biswa Sonan v. Binanda Chunder	196
Bikker v. Beeston	118	Bithal v. Ram Kishore	136
Bikram Ahir v. Rajpati Lal	771, 777	Blackbeard v. Lindigren	438
Binda Ali v. Ameerun	769	Bodh Singh v. Gunesh Chunder	769, 771, 773
Binda Deber v. Gopee Soonduree	626	Sen	
Binda Prasad v. Ram Chandar	783 831	Bohra Bhupal v. Kundal Lal	221
Bindeshri Prasad v. Girdhar Das	212	Bonomali v. Prosunno	203, 217
		Bonomli v. Woomesh Chunder	632

	Page
Bolitho & Co. Ld. v. Gidley	107, 170, 365
Bommaraju Venkata Perumal v. Subramanya Nayani varu	202
Bommayya v. Chidambaram	629, 632
Boojha Roy v. Ram Kumar	500
Booth v. Trail	105
Bower v. Hett	82
Bowman v. Taylor	781
Bradley v. Copley	94
Brahm Singh v. Bhandu	535
Braijuath v. Dharan Deo	518, 519
Brajabala v. Gurudas	271
Brajarai v. Mohammad	712
Brajlal v. Atkinson	784, 786, 791
Brenner, <i>In re</i>	204
Brereton v. Edward	372
Brij Kishore v. Pratab	580 616
Brij Mohun v. Rai Uma Nath	615
Brij Nandan v. Dal Dapat	458
Brohmo Moyu v. Raj Chunder	882
Brojender v. Kanwar	360
Brojendra Kunwar v. Asutosh	910
Brojendra Kumar v. Kalinath	34
Brojosundar v. Moti Lal	636
Brown Janson Co. v. Hutchinson & Co.	405
Bryant v. Torkington	173
Buddoo Mull v. Maharoop	417
Budhi Mal v. Bhati	136
Budhu v. Barkat Ram	212 218
Budhu v. Bhagirathi	914
Budhu v. Hira	507
Budreenath v. Rajah Chunder	469
Budrudeen v. Abdul Rahim	265
Buhuns Koonwar v. Buhooree Lall	506, 685, 771
Bukshi Ram v. Shco Porgash	307
Bulihand v. Zinatunnissa	536
Bullus v. Bullus	397
Bugshidhar v. Kedarnath	600, 601
Bunwarce v. Girdharee	359 360
Bunwar v. Mohabir	361
Burchand v. Virachampakachar	390
Burrell v. Read	281

	Page
Buta Singh v. Chattar Singh	694
Byemkesh Chakrabutty v. Hemanta Kumar	611
Bykantnath v. Rajendro	263, 264, 521, 526, 527, 851

C

Cadogan v. Lyric Theatre Ld.	370
Caila v. Elgood	206
Cairney v. Back	205, 207
Calcutta Trades Association v. Ryland	156
Cale v. Hindson	46
Calcutta Trades Asscoiation v. Ryland	153
Callow v. Young	44
Cangayam Venkataramana v. Henry Sameo Coolley	718
Carapiet v. Panna Lal	137
Cassamally v. Sir Currimbhoy	781
Cavenagh v. Collett	56
Chail Behari Lal v. Kidarnath	333
Chakrapani v. Dhanji	288, 487, 611
Chakravarthi v. Ammayappa	134
Chalavadi Kotiah v. Paloori Alimelammah	197
Chaman Lal v. Kamaruddin	718
Chamiyappa Taragan v. Rama Iyer	193, 194, 217
Champion v. Palmer	112
Chandan Lal v. Muhammad Hussain	391
Chandan Singh v. Ramdeni Singh	517
Chandeshwar v. Bisheswar	371
Chandicharan v. Banke Behary	594
Chandi Dutt v. Pudmanund	375
Chand Mall v. Ban Behari	22
Chandra Benodo v. Ala Bux	565
Chandra Bhusan v. Ramakanth	297, 298
Chandi Charan v. Ambika-Charan	860
Chandradhari v. Tipan Prasad	350
Chandra Kumar v. Kamini Kumar	678

	Page
Chandrama v. Maharaja of Duniram ..	655
Chandramoni v. Jaliyennessa ..	793
Chan Tat v. Ma Lat ..	336
Chanto Chandar v. Nain Sukh ..	695, 696
Charamudi v. Raghavulu ..	124
Charan Chandra v. Chandi Charan ..	638
Charni v. Raj Bahadur ..	718
Charu Chandra v. Rai Behari Lal ..	647
Charu Chundra v. Sambhunath ..	519
Chas. R. Cowie & Co., v. Skidmore ..	60
Chasteauneuf v. Capeyron ..	93
Chatrapat v. Grindra Chunder ..	506, 716
Chattrapat v. Jadukul Prasad ..	611
Chatterpat Singh v. Sait Somari- mull ..	11
Chatterpat v. Surendranath ..	617
Chatter Singh v. Tej Singh ..	518
Chatterton v. Watney, 112, 205, ..	208
Chaudhury Krishnayya v. Koripalli Raju ..	521
Chaudhry Rameshwar v. Choudurri Sureswar ..	589
Chauharja v. Kanix Fatima ..	662
Chauramoni v. Rajendra Kumar ..	138
Chawrasi v. Bhakan Sahu ..	7, 10
Chedami Lal v. Amir Beg ..	554
Chena Pemaji v. Ghelabhai ..	16
Chenvirappa v. Puttappa ..	689
Cheranji v. Jawahir ..	262
Cherathi v. Raman Nair ..	785
Cheriyarakel v. Vayaka Param- bath Imbichi Ammah ..	310, 313
Cheriyonni v. Nebar Poyile ..	22
Chet Ram v. Kanshi Ram ..	516
Chhagan v. Lakshman ..	557
Chhotalal v. Nabi bhai ..	861
Chidambaram v. Doraiswami ..	137
Chidambaram v. Kandasami ..	805
Chidambara v. Ramasami ..	231
Chidambaram v. Subramania ..	700

	Page
Chidlo v. Piari Lae ..	508, 506
Chillakore Veerra Musula Reddy v. Pattangi Ramayya ..	292
Chinnabai v. Dhula Kuppa ..	615
Chinna Pillai v. Kalimuthu ..	708
Chinna v. Rama Dial ..	349
Chinna Sadashiv v. Ram Dayal ..	303
Chinnu Pillai v. Venkatasamy ..	720, 721, 722, 723
Chintaman v. Balshastri ..	197
Chintaman v. Chuni Sahu ..	571
Chintamani v. Iswar ..	327
Chintamanrow v. Vithabai, 127, ..	453, 506, 509, 715
Chitibabu Adinna v. Garmalla Jaggarayadu ..	438
Chokkalinga v. Srinivasa ..	617
Chokkalingam v. Chidambaram ..	912
Chokalingam v. Maung Yeik U.B.R. ..	013
Choudhary Kesri v. Giani Roy ..	588
Choudhry v. Kallee Mohun ..	664
Choudhuri Chintamani v. Monmohini ..	8
Choudhury Jagadish v. Choud- hury Sureswar Missir ..	40
Choudhry Ram Prasad v. Mahesh Kant ..	39
Chote Narain v. Rameswar ..	162
Chottha Ram v. Mti Karman ..	196
Chouharja v. Kaniz ..	661
Chowdharee v. Dwarka Doss ..	823
Chowdhry Kesri v. Giani Roy ..	589
Chullile v. Othenam ..	118, 119
Chuman Lall v. Doman Lall ..	197
Chundee Charan v. Banke Bihary ..	593, 594
Chunder Roy v. Brojo Behary ..	667
Chunder Shekhna v. Jadub Chunder ..	629
Chunia v. Ram Dial ..	245
Chunni v. Lalaram ..	536
Chunnilal v. Debi Prasad ..	261
Chuoni Lal v. Lachman Prasad ..	89
Churchill v. Siggers ..	825
Chutka v. Goberddhone ..	646
Chutoorhooj v. Villaet Ali ..	714
Chutterput Singh v. Maharaj Bahadoor Singh ..	720
Chutter v. Dhurum ..	463, 622

	Page
Clark v. Alekander	850, 851
Clarke, <i>Re</i>	.. 205
Cleiner v. Mutual Reserve Fund Life Association	.. 116
Clisold v. Cratchley	.. 818
Coaks v. Boswell	447, 448
Cocks v. G.W.R.	.. 28
Cohen v. Hale	.. 111
Cole, <i>Re</i>	.. 204
Cole v. Davies	.. 83
Cole v. Eley	112, 206, 398
Collector of Broach v. Venilal	135
Collector of Monghyr v. Hurdai Narain	491, 705
Collector of Shajahanpur v. Kuni Behari	.. 787
Collingridge v. Paxton	.. 90
Collins v. Stimson	.. 434
Colonel Lecky v. Bank of Upper India Ltd.	.. 155
Combinel & Co., <i>Re</i>	206, 208
Common, <i>Re</i>	.. 111
Cooper v. Lawson	.. 118
Cooper v. Willomatt	.. 95
Coote v. Coote	.. 471
Courtoy v. Vincent	.. 92
Cowan's estate, <i>Re</i>	108, 171
Cowar Rajkumar v. Kodambini Debi	270 278
Coventry v. Tulshi	787, 788
Croshaw v. Lyndhurst Ship Co.,	.. 372
Crowe v. Price	149, 366
Crutchley v. Jerningham	.. 434
Curling v. Marquis Townshend	.. 356
Cursetji v. Gangaram	.. 375
C. V. C. T. Firm v. Saya Bya	.. 822

D

Dacosta v. Kalu Pershad	.. 197
Dadoba v. Damodar	712, 715, 718
Dagda v. Pancham Sing	506, 508, 509, 716
Dagadu v. Vanji	.. 139
Daji Himat v. Dhirajram	517, 522, 662
Dakeshwar v. Rewat	.. 517
Dakshina v. Basumati	.. 451
Dakhina Churn v. Bilash Chunder	.. 514
Dakhyani Deber v. Dole Gobind	.. 352

	Page
Dalchand v. Bank of Upper India	.. 579
Dalchand v. Narayan	.. 40
Dallu Mal v. Hari Das	.. 266
Daloon v. Sungun	.. 166
Damodar v. Murari	.. 440
Damrupat Singh v. Rameshwar Singh	.. 428
Danappa v. Yamnappa	.. 233
Daniel v. Mohun Bibee	.. 823
Daniels v. Fielding	.. 823
Darbari Mal v. Mula Singh	22
Darshan Singh v. Ratan Lal	518
Darya Singh v. Mahtab	.. 380
Das Narayan Singh v. Mir Mahamad	.. 542
Dattaram v. Gangaram	.. 234
Dattaraya v. Rahimtulla	.. 850
Dattatraya v. Venkatesh	.. 725
Datto v. Ganesh	.. 665
Daud Ali v. Ram Prasad	.. 196
Daulat v. Jugal Kishore	.. 378
Daulatram v. Abdul Kayum	215
Daulat Bibi v. Qutub Hussain	.. 488
Davis, <i>Re</i>	.. 82
Davis v. Freethy	112, 206
Davis v. Shapely	.. 818
Davud Beg v. Kullappa	.. 352
Dawson v. Wood	.. 95
Dayachand v. Hemchand	343, 348
Dayamayi v. Ananda Mohan Roy	.. 562
Dayaram v. Govardhandas	292, 333, 344, 867
Debendra v. Ruplal	.. 119
Debendranath v. Ananthanath	.. 802
Debendranath v. Mirabdul	.. 801
Debendra Nath v. Prasanna Kumar	635, 648, 668, 669
Debi and London Bank v. Ramrattan	.. 796
Debi Prasad v. Muhammad	581
Debkumari v. Ram Lal	.. 361
De Coppett v. Barnett	.. 818
Dedar Buksh v. Ake Cowree Singh	.. 328
Deefholts v. Peters	.. 271
Deekappa v. Chanbasappa	.. 527
Deendyal v. Jugdeep	.. 705
Defris & Sons, <i>Re</i>	.. 111
Degumburee In re	.. 627
Delhi & London Bank v. Pertab	139, 190, 859

	Page		Page
Delhi and London Bank Ltd.		Dharan Chand v. Mitusi Bussan	
v. Ram Narain	.. 242	..	621
Delhi and London Bank v.		Dharninder v. Bakhdi	.. 916
S. J. Tellary	... 215	Dheraj v. Dhun Coomaree	.. 169
Delhi & London Bank v.		Dhirendra Nath v. Kamini	
Unconvenanted Service	.. 215	Kumar	611, 617
Deljan v. Hemantakumar	.. 637	Dhirendra Narain v. Narendra	
De Medina v. Grove	.. 818	Narain	.. 638
Denobundoo v. Shoshi Mohun		Dhobi Roy v. Mahadev	.. 714
..	88	Dhondo v. Govind	.. 343
Denonath v. Kalikumar	.. 579	Dhondu v. Ramji	.. 694
Denonath Rukhit v. Mutty Lall		Dhonkul v. Phakkar	.. 5
Paul	.. 16	Dhulabhai v. Lala	.. 706
Deoki v. Tapesri	.. 478	Dhurmo v. Shreemuty	.. 819
Deokinandan v. Bansi	.. 429	Dhurmo Narain v. Sreemutty	
Deokinandan v. Rajah Dakeswar		..	823
..	429	Dhurni Kota v. Budharaja	.. 639
Deonandan v. Janki Singh	.. 516	Dickinson v. Kitchen	.. 93
Deo Nandan v. Uditnarayan	881	Dildar v. Narayan	345, 348
Deosaran Lal v. Syedunnissa	616	Dildar Hussain v. Sheo Narain	
De Penha v. Jalbhoy	.. 419	..	195
Depree v. Bedfordborough	.. 471	Dimmarch v. Bowley	.. 825
Desai v. Mundas	.. 718	Dina v. Bahawal Baksh	.. 517
Desiappa v. Dundappa	786, 787	Dinabandhu v. Mashuda Khatun	
Devaluru Vijaya Ramayya v.		..	518
Devaluru Venkata Subbarao		Din Dayal v. Naziruddin	.. 421
..	519	Din Dyal v. Ram Tattun	.. 359
Devanarayan v. Chunnilal	.. 869	Dinkar v. Hari Sridhar	.. 305
Devara Hedge v. Vaikunt Subaya		Dinobundhu v. Jogamaya	.. 214
..	132	Dinobundhoo v. Macnaghten	360
Devarasetti Narasimham v.		Dinobundhoo v. Shoshee Mohun	
Devarasetti Venkiah	.. 103	..	644
Devji v. Sambhu	.. 705	Dipchand v. Naushadali	.. 60
Devidas v. Pirjada	500, 769	Dipchand v. Sheikh	.. 44
Devi Prasad v. Lewis		Diplomatic v. Churchill v.	
..	105, 150, 152	Siggers	.. 819
Devi Prasad v. Secretary of State		Diwali v. Apaji	89, 168
..	160	Diwan Chand v. Bedba	197, 265
Dewaji v. Amrita	.. 679	Diwan Singh v. Bharat Singh	
De Winton v. Brecon Corporation		..	490, 657
..	171	Dixon v. Rowe	.. 106
Dhanammal v. Vceraraghavulu		Doyal Krishna v. Amrita Lal	675
..	598	Doe d. Batten v. Murless	.. 817
Dhan Devi v. Zamurrad Begam		Doe d. Emmet v. Thorn	.. 817
..	353	Doe d. Hull v. Greewhite	.. 129
Dhanno v. Upendramohan	.. 162	Doe d. Mitchinson v. Carter	127
Dhanoomal v. Mt. Kaim Khatun		Dolphin v. Layton	.. 118
..	123	Donkal v. Phakkar	.. 196
Dhanpat Mal v. Khazana	.. 518	Donzelle v. Kedarnath	.. 780
Dhanukdhari v. Nathimasahu		Doolar Chand v. Lall Chabul	694
..	642	Doorga Narain v. Baney Madhub	
Dharamdas v. Hofasji	.. 148	..	506
Dharam v. Queen Empress	12	Doorga Pershad v. Vrindaban	
Dharam Singh v. Angao Lall	719	..	128
Dharam Singh v. Nand Singh		Doorvasi Seshadri Aiyar v.	
..	61	Govindaswami	.. 784
		Dorab v. Abdool	.. 800

	Page
Dorabally v. Abdool Azeez..	644
Dorab Ali Khan v. Executors of K. Moheeoodeen	412, 661, 694
Dorairaja v. Veeranan	.. 637
Doraiswami v. Chidambaram	.. 547
Doraisami v. Muthusamy..	337
Dorga Naraiff v. Baney Madhub	.. 507
Dori Lal v. Patti Ram	.. 606
Doorga Dutt v. Bunwaree..	360
Dorayya v. Veerayya	.. 791
Dost Mohamed v. Subramanian	.. 855
Doyamoyi Dasi v. Sarat Chunder	484, 486
Doyanidhi v. Kelai	.. 887
Dubomisser v. Srinibas	.. 140
Duckworth v. Duckworth..	156
Dukhada v. Srimonto Hoardar	... 769
Dulip Narain v. Parmaoti Bibi	.. 532
Dullabhadas v. Lakshman Doss	.. 718
Dulhin v. Bansidhar	580, 593, 597
Dulari v. Mohan Singh	.. 552
Dularam v. Badaldas	.. 705
Duncan v. Garratt	.. 93
Dungaram v. Rajakishore Deo	.. 491
Duni Chand v. Atma Singh	632
Durga v. Bhagwan	770, 779
Durga v. Balwant	.. 455
Durgachandra v. Koilashchandra	.. 137
Durgacharan v. Kaliprasanna	128, 566, 627, 650
Durga Charan v. Karanat Khal	.. 793
Durga Churn Rai Chowdhry v. Monmohini Das	.. 223
Durga Das v. Dewraj	27, 30
Durgadas v. Umatal Hosain	218
Durga Kunwar v. Balwant	625, 652
Durgaprasad v. Shambhu..	140
Durga Singh v. Bisheshar..	714
Durga Sundari v. Govinda- chandra	455, 644, 645
Durpati Bibi v. Ramrach Pal	241, 262
Durpo Narain v. Nuleetah Soonduree Doss	.. 717
Dutt v. Cornelius	.. 64

	Page
Dwar Buksh v. Fatik Jali..	914
Dwarka Das v. Kameshar	342, 352, 353
Dwarka Nath v. Alope Chunder	.. 421
Dwarkanath v. Bankee Behari	261, 263
Dwaraka Nath Misser v. Hurrish Chunder	.. 565
Dwarkanath v. Ram Chunder	220
Dwarakanath v. Tarini Sankar	.. 566
Dwarka Prasad v. Nasir Ahmad	.. 164
Dwarka Prasad v. Ram Autar	.. 440
Dwijendra Moban v. Manorama Dasi	.. 233
Dy. Commissioner, Amritsar v. Ballamal	.. 394

E

Easin v. Intigerenessa Bibi	..	769
Ebji v. W. A. Graham & Co.	..	852
Edmunds v. Edmunds	..	107
Edward & Co. Ltd. v. Picard	..	369
Edwards v. Edwards	..	173
	369,	374
Egginton's Case	..	46
Ellenborough, <i>In re</i>	..	165
Elwell v. Jackson	..	111
Emmett v. Thorn	..	817
Emnabai v. Fakir Mahomed	..	520
Emp. v. Amarnath	..	48
Emp. v. Asharfi Lal	..	379
Emp. v. Bhajan	..	379
Emp. v. Silas	..	100
Enaet v. Nujeeboonessa	..	168
Erafanuddin v. Badan She-ikh	..	519
Erava v. Sidramappa	..	544
	551,	661
Erikullappa Chetty v. Official Assignee of Madras	193,	208
Erode Manikkoth v. Pethiedeth	577,	579
Erusappa v. Commercial and Land Mortgage Bank Ltd.	557,	717
Esmail v. Abdul Aziz	..	631
Evans v. Rival Granite Quarry Co. Ltd.	..	207

	Page
Evans v. Roberts	.. 103
Ex parte Hawkins	.. 207
Ex parte Pinsent	.. 62
Ex parte Smith	.. 205

F

Fani Bhushan v. Surendranath	516, 521, 522
Fazal Ahmad v. Wesaluddin	430
Faez v. Ramsukh	.. 716
Faithfull v. Ewen	.. 206
Faizuddin v. Tincowri	.. 645
Fakharooddeen v. Pogose	.. 797
Fakharuddin v. Official Trustee	.. 631
Fakir Mahomed v. Aga Mahomed Ali	.. 689
Fakran v. Rajab Ali	.. 578
Fani Bhushan v. Surender- nath	.. 622
Farhat-un-nissa v. Sundari Prasad	377, 390
Farlie v. Eanks	.. 822
Farqeer v. Khunderun	.. 714
Farrant v. Thompson	.. 817
Farrow v. Wilson	.. 142
Fatehchand v. Panna Lall Bania	.. 38
Fateh Muhammad v. Gopal	121
Fatima v. Sakharam	345, 349
Fatima Begum v. Sakina Bai	147
Fatima Khatoon v. Maho- med	.. 459
Fatmatul Kubra v. Achchi	532
Fatte Singh v. Daropadi	.. 505
Fayaz Hossein Khan v. Prag Narain	.. 726
Fazal v. Manzur	486, 576, 586
Fazar v. Uzir Ali	.. 791
Fazil Karim v. Ananda Mohan	.. 590
Fazlahar Rahaman v. Jawahir	619, 629
Fazlar Rahman v. Jawahir Singh	.. 637
Fazluddin v. Khetra Ghorai	669
Firm of Behari Lal v. Official Receiver, Lahore	.. 522
Fisher v. Arunachellam	.. 354
Fida Hussain v. Kutub	.. 550
Figg v. Moore Bros.	.. 208
Fink v. Bahadur-Singh	.. 855
Fink v. Maharaj Bahadoor	362
Firm of Aji Umar v. Rodba	855
Firm of Haji Umar v. Rooba	851
Fisher v. Arunachella	.. 353

	Page
Fletcher v. Manning	.. 204
Forth v. Norfolk	.. 129
Framji v. Horamsji	.. 463
France v. Campell	.. 90
Frederick v. Madongopal	208, 398
Freston, ex parte	.. 46
Fritzpatrick v. Waring	.. 108
Fuggle v. Bland	.. 364
Fuzal v. Manzur	.. 601
Fyaz-ood-deen v. Girandh Singh	.. 233

G

Gadadhar v. Midnapore Zamindari Co. Ltd.,	.. 453
Gadae Lakminarsamma v. Narugotla Pydanna	.. 301
Gadigapp v. Shidappa	.. 787
Gajadhar v. Mulchand	712, 718
Gajadhar v. Ram Summiran	592
Gajanan v. Nilo	800, 801
Gajanan Vasudev v. Nilo Sakharam	.. 685
Gajendranath Dey v. Moulvi Ashraf Hossain	.. 124
Gajrajmati v. Akbar Husain	488, 623
Galbraith v. Grimshaw and Barter	205, 209
Galstaun v. Woomash Chandra	.. 432
Galzari v. Bhikari	.. 87
Gananambal v. Parvathi	.. 568
Ganpat v. Mahadev	.. 44
Ganapat Lal v. Bindbasini Prasad	.. 726
Ganapati v. Devappa	192, 196, 241
Ganapathi v. Mani Anautha	157
Ganapathi v. Krishnamachari	.. 654
Ganapathi Pillai v. Malaya Perumal	629, 633
Ganpatlal v. Sampatram	.. 152
Ganpatram v. Isaac	.. 378
Ganapatram v. Lakshman	.. 132
Ganapatrao v. Anandrao	.. 589
Ganpat Rao v. Kesari Chand	469
Ganesh v. Bhikoji	.. 203
Ganesh v. Bisram	.. 802
Ganesh v. Fattah Chand	.. 8
Ganesh v. Gopal	.. 453
Ganesh v. Kashinath	.. 335
Ganesh v. Purushottam	451, 803
Ganesh v. Shankar	.. 140

	Page		Page
Ganesh v. Vittal ..	597	Ghania Lal v. Pohlo Mal ..	233
Ganesh Chandra v. Bauwari Lal ..	241	Ghanshyamadas v. Hardei ..	518
Ganesh Das v. Shiva Lakshman ..	861	Ghashi Ram v. Mangal Chand ..	337
Ganesh Lal v. Kumar ..	376	Ghasiti v. Abdul Samad ..	601, 638
Ganesh Narayan v. Gopal Vishnu ..	556, 655	Ghazaffar v. Lala Ram ..	634
Ganga Baksh v. Rudar Singh ..	778	Ghazafar Husain v. Ramaratan ..	633
Gangabattula Kantamma v. Manchiraju Reddipantulu ..	433, 472, 473	Ghisulal v. Todarmull ..	853, 856, 867
Gangadas v. Bai Suraj ..	474, 475	Gholam v. Indrachand ..	121
Ganga Din v. Chet ..	688	Gholam v. Manindranath ..	594
Ganga Din v. Khushali ..	219, 222, 223	Ghulam v. Hassan Din ..	905
Ganga Frasad v. Ganga Baksh ..	391	Ghulam v. Narain ..	787
Ganga Pershad v. Gopal ..	535	Ghulam Abbas v. Munnil Lall ..	517, 521
Ganga Prasad v. Raj Coomar ..	429	Ghulam Muhammed v. Narain Das ..	790
Gangaram v. Dinonath ..	4	Ghurey v. Sanwalia ..	134
Gangaram v. Laxman ..	124	Ghulam Muhammad v. Teck Chand ..	164
Gangaram v. Parbhu ..	130	Gibbons v. Alison ..	824, 825
Gangaram v. Tikasham ..	718	Gilding v. Eyer ..	818
Gangaram v. Yashodabai ..	714	Giles v. Grover ..	205
Ganga Sahai v. Bapu ..	392	Gillet v. Gillet ..	396
Ganga Sahai v. Kesri ..	771, 472	Girdhar Das v. Collector of Ghasipur ..	384
Gangathara v. Rathabai ..	627, 652	Girdhar Das v. Har Shankar ..	390, 393
Ganges Flour Mills Co. Ltd. v. Ahadi Ram ..	535	Girdhar Das v. Siddheswari ..	577, 646
Gantasola Jagannadhan v. Thathavarthi Ramabrahmam ..	585	Giridhari Lal v. Altaf Ali ..	429
Gaustin v. Asplin ..	94	Giridhari Singh v. Hurdeo ..	610
Gauhar v. Bansidhar ..	600	Giridhari Lal v. Bhago ..	233, 491
Gaulstan v. Bannerjee ..	857	Girija Nath v. Upendra Nath ..	212
Gauri v. Hinga ..	637, 638	Girindra v. Nandlal ..	486
Gauri Prasad v. Bholonath ..	27	Girindra Kishore v. Nanda Lal ..	636
Gauri Shankar v. Chinnumiya ..	391, 392	Girindranath v. Kedarnath ..	851, 857
Gauri Shankar v. Lachman ..	785	Girish Chunder v. Golam Karim ..	490, 539, 663
Gawri Prasad v. Ram Ratan ..	868	Girishchandra v. Sri Krishna ..	263, 526
Gayadin v. Baijnath ..	293, 300	Girwar Sahai v. Mangal ..	12
Gayadin v. Syed ..	139	Gladstone v. Padwick ..	83
Gaya Prasad v. Bihari ..	27	Glyn v. Hood ..	405
Gaya Prasad v. Lareti Kaur ..	776, 796	Gnanendra Kumar v. Rishendra Kumar ..	10
Gaya Prasad v. Randhir ..	557, 659	Goba Nathu v. Sakharan ..	217, 916
Geisse v. Taylor ..	207	Gobberdhan Das v. Mukudi Lal ..	299
Genda Mal v. Munshi Ram ..	656	Gobi Chand v. Benarsi ..	419, 620
Gend Lal v. Denonath ..	334	Gobind v. Bamun ..	622
Genner v. Sparks ..	55		
Geno v. Sakharan ..	455		
Ghafur Han v. Muhammad ..	22		

TABLE OF CASES CITED

XXV

	Page		Page
Gobind Singh v. Zalim Singh	.. 228	Gopala Iyer v. Ramaswamy	
Goburdhun v. Banee Chunder	.. 823	Sastrigal	.. 137
Godha v. Naik Ram	.. 352	Gopala Iyer v. Rama Venkata	
Gogaram v. Kartic Chunder	866	Subba Iyer	.. 214
Goggabundhu v. Purmanund	.. 888	Gopalakrishna v. Visvatha	.. 585
Gogun Chunder v. Dhuronidhur		Gopalaswami v. Govindaswami	.. 773
Mundul	.. 322	Gopal Chandra v. Notobar Kundu	.. 274
Gokul v. Mohri	.. 300	Gopala Chunder v. Gunamoni	
Gokaldas v. Jankibai	.. 247	Dask	.. 542
Gokuldas v. Purammal	.. 780	Gopal Chunder v. Mohesh	
Golak Nath v. Mathura Nath	88, 127	Chunder	.. 334
Golam v. Inderchand	.. 137	Gopalchunder v. Ram Lal	453, 556
Golam Mahomed v. Indra Chand	.. 105	Gopal Chunder Chatterje v.	
Golam Mujahar v. Goloke Charan	.. 590	Gunamoni Das	.. 545
Gol Asmater v. Habibulla	.. 349	Gopal Panda v. Baikunta	
Golafaun v. Woomes Chnadra	.. 855	Mahapatro	.. 22
Goldschmidt v. Oberrheinische		Gopal Prasad v. Kashinath	218
Metallewerke	.. 367	Gopal Singh v. Dular	.. 486
Goluck Chunder v. Nundo		Gopal Purushottam v. Bai	
Coomar	.. 122	Divali	.. 325
Gomad Mahad v. Gokaldas	.. 832	Gopal Sahai v. Shen Karan	851
Gonda v. Bhagwan	.. 790	Gopal Singh v. Ganpatrai	299, 300
Goodur Lall v. Aubeeboonisa	.. 652	Gopee Lall v. Mohunt	.. 694
Gooroo Das v. Sona Mnee	280, 299	Gopee Nath v. Luchmeeput	619
Gopal Singh Ganpat Rai, <i>In re</i>	.. 333	Gopenath v. Achacha Bibee	260
Gopi Chand v. Kasimunnessa	.. 525	Goreswar v. Brojo Sundari	604
Grani v. Subramaniam	.. 862	Gorakh v. Sidh Gopal	.. 165
Green v. Palmer	.. 181	Gordhandas v. Firm of Gekal	
Grreenlaw v. King	.. 444	Khatoo	.. 127
Gridhari v. Hurdeo	.. 617	Gordon v. Harper	.. 94
Grija Kanta v. Mohin Chandra	.. 705	Gorton v. Falkner	.. 180
Grish Chunder v. Brojo Jibun	.. 645	Gopi Chand v. Benarsi Das	626, 788
Groves v. Administrator-General	551, 622	Gopi Chand v. Karimunnisa	263, 416
Gopal v. Chunni Lal	.. 851	Gopi Koeri v. Gopal Lal	.. 486, 633
Gopal v. Janki Kcer	7, 8	Gopinath v. Bhugwat	.. 616
Gopal v. Joharimal	139, 190, 211	Gopinath v. Gur Paasad	.. 209
Gopal v. Kondo	.. 784	Gossain v. Issur Chunder	.. 122
Gopal v. Krishna Rao	.. 889	Gosain Das v. Mrittunjoy	688
Gopal v. Marsden	.. 169	Goshain v. Chingunlal	.. 444
Gopal v. Roy Bunwarce	451, 464	Gosta Behari v. Sankarnath	578
Gopala v. Ramaswami	137, 138, 141	Goswami Gordhan v. Goswami	
		Madhusudan	.. 29
		Goteti Vigneswarudu v. Venkata	
		Suryanarayanamurthi	221, 855
		Goudoin v. Venkatesa	.. 89
		Gour v. Hem Chunder	.. 799
		Gour Chunder v. Chunder	
		Coomar	.. 477
		Gourchandra v. Janardhan	786

	Page		Page
Gour Kishore v. Chandra Mohan	617, 620, 630	Gurandittamal v. Rustomji	380
Gour Moni v. Jugat Chandra	785	Gurdeo Singh v. Chandrikah Singh	.. 275
Gour Mookh v. Lalla Gour	464	Gur Prasad v. Lalman	647, 679
Gouri Sunkur v. Aboboyessury	.. 122	Gurshidawa v. Gangoya	.. 677
Gouri Dutt v. Amar Chand	.. 855	Gutti Lal v. Bir Bahadur Singh	.. 861
Gevind v. Dheklu	.. 294	Guru Baksh v. Jawahir	.. 632
Govind v. Gangaji	.. 909	Gurudas Biswas v. Thakamani	540, 542
Govind v. Ramakrishna	132, 143	Gurudas Pyne v. Ram Narain	.. 322
Govind v. Sadasiv	28, 29	Gura Mahadeva v. Mahabir Sukul	... 9
Govind v. Shankar	.. 679	Gurunarain v. Ram Narain	.. 666
Govind v. Venkata Sastrulu	889	Gurupdaapa v. Irappa	.. 808
Govinda v. Meenatchi	.. 168	Gurusami v. Venkatasami	.. 232
Govinda Chandra v. Kailash Chandra	.. 790	Guruva v. Subbarayudu	.. 315
Govindanath v. Kedarnath	850		
Govinda Pillai v. Meenatchi Achi	.. 169	H	
Govindarajulu v. Ranga Rao	444	H. B., Re	.. 111
Govindaswami v. Pethaperumal	.. 888	Habibuddin v. Hatim Mirza	679
Govindaswami v. Ramaswamy	.. 167	Habibullah v. Abdulla	.. 30
Govindlal v. Ram Janam	.. 567	Hafiz v. Abdullah	.. 199
Gowree Kumul v. Sarat Chunder	.. 686	Hafiz v. Damodar	417, 857
Gowri Crasad v. Ram Ratan	868	Hafiz Jalaluddin v. Musamat Maniran	.. 290
Gubboy v. Ramdoyal	.. 60	Hafiz Suleman v. Sheikh Abdullah	217
Guisse v. Jaisraj	.. 293	Hajee Goya v. Zaccheus	568, 661
Gujadhar v. Naik	.. 467	Haji v. Atharaman	.. 663
Gujramati v. Saiyid	.. 458	Haji Abdul Gani v. Raja Ram	916
Gumadi v. Hardwar	.. 220	Haji Arjun Mullick v. Sheik Farutullah	.. 776
Gulab v. Bansidar	.. 167	Haji Baboo v. Sobhag Chand	340
Gulab v. Mutsaddi Lal	.. 300	Haji Jiva v. Abu Bakar	.. 246
Gulab Singh v. Pemian	.. 23	Hajrabibi v. Shiam Narain.	719
Gulam Ahad v. Judhister Chundra	.. 625	Haladhar v. Ambikacharan.	64
Gulanias v. Collector of Surat	.. 157	Haladhar v. Prafullanath	.. 629
Gullapalli Venkataramayya v. Koonaparaju Venkataraju	777	Hale v. Castleman	.. 818
Gulzari v. Jadaun	345, 348	Hall v. Hall	.. 874
Gulzari v. Madho	.. 800	Hall v. Pritchett	.. 107
Gunesar v. Gonesh	.. 790	Hamid v. Buktear	.. 288
Gungalai v. Jaukibai	.. 710	Hamilton v. Brogden	.. 370
Gunga Gobind v. Bhoopall Chunder	.. 888	Hamilton v. Shanker Dass.	855
Gunga Narain v. Andua Moyce	.. 623	Hancock v. Smith	113, 113
Gunga Pershad v. Gopal	.. 658	Haneswari Daso v. Radhika Prosad	.. 40
Gunga Pershad v. Jawabir Singh	.. 449	Hanooman v. Luchman	.. 597
Gungaram v. Moola	.. 441	Hansraj v. Sheik Mohideen Rowther	.. 617
Gunindra v. Baiginath	.. 807	Hanumandoss v. Valabhadas.	705, 706
Guno v. Baboo Muddum	.. 203	Hanuman Prasad v. Harakh Narain	.. 566
Gunputhy Roy v. Thakurdye	259		

TABLE OF CASES CITED xxvii

	Page		Page
Hanuman Pershad v. Jadu- nandan ..	769	Harichandra v. Shrimati Sashimala ..	292
Hanuman v. Muhammad ..	517, 518	Harishankar v. Naran ..	329, 342
Hanuman Rai v. Jagdis Rai ..	519	Harish Chandar v. Ganga Bishun ..	590
Haradhan v. Kartik Chandra	716	Harish Chandra v. Nripen- dra Coomar ..	770
Harai v. Faizlur ..	597, 852, 855	Hari Sundari v. Shashi Bala ..	597, 855
Harakh v. Gopi Kishun ..	883	Harjivan v. Shivram ..	122, 881
Hara Lal v. Chundro Kanto.	635	Harkisandas v. Bai Ichha	504, 506
Harbagwan v. Taja ..	889	Harlal v. Narayan ..	202
Harbans Lal v. Kundan Lal.	652	Harmansingh v. Saligram..	91
Har Bhagat v. Anandram ..	851	Harnam Singh v. Bishan Singh ..	720
Hardeo v. Narbadi ..	377, 489	Harnam Singh v. Kishen Chand ..	334
Hardeo Sahai v. Gauri Shan- kar ..	520	Harnandan v. Prannath ..	193
Har Din Singh v. Lachman Singh ..	908	Harnath v. Indar Bahadur.	164
Harendra v. Haricharan ..	428	Har Nihal v. Shamji Mal ..	905
Hargovan v. Hira ..	378	Haro v. Jadub ..	422, 623
Hargulab v. Gobind Roy ..	724	Har Prasad v. Jagan ..	262
Hari v. Anadarav ..	850	Har Prasad v. Radha- krishnan ..	39, 794
Hari v. Bhubaneshwari ..	518	Harris v. Beauchamp ..	364, 369
Hari v. Tara Prasanna ..	449	Harrison v. Paynter ..	90
Harichand v. Krishindas ..	776	Harry Charen v. Subaydar ..	28
Hari Charan v. Birendranath	853	Har Sarup v. Balgobind ..	197
Hari Charan v. Chandra Kumar. ..	490, 539, 663	Harshankar v. Baijnath ..	106, 149, 169
Hari Charan v. Haridas ..	588, 645	Hart v. Hara Prasanna ..	859, 868
Hari Charan v. Man Mohan.	911	Harvey v. Harvey ..	43
Haridas v. Baroda Kishore ..	105, 163	Hasan Ali v. Azha Rut Husan ..	714
Haridas v. Raj Kumar ..	4	Hashmat Ali v. Mahewa Estate ..	509, 714
Haridoyal v. Sheikh Sam- suddiv ..	677	Hasan Ali v. Azha Ral Husan ..	639
Hari Ganesh v. Yamunabai.	785	Hatim Miza v. Bhagwana ..	647
Hari Govind v. Ram Chan- dra ..	769	Hawkins v. Hall ..	108
Harihar v. Rama ..	600, 601	Hay v. Ram Chander ..	154
Hari Krishna v. Venkata Lakshmi Narayana ..	909	Haythorn v. Bush ..	93
Harilal v. Abhesang ..	271, 281	Hazari v. Badai ..	581
Hari Lal Ghose v. Chandra Kanta Ghose ..	650	Hazarimal v. Namdev ..	450
Hari Lal v. Tripura Charan.	443	Hazari Mull v. Janaki Pra- sad ..	571
Hari Mohan v. Hurshook ..	339	Hazariram v. Badairam ..	126
Hari Mohun v. Bhano Ali ..	888	Hemanginee v. Jogindro ..	778
Haripada v. Baroda Prasad.	655	Hemanginee v. Kumode Chunder ..	364
Haripada v. Surendranath ..	293	Hem Chandra v. Sarat Kamini ..	632
Hari Prasad v. Koda Marya.	139	Heryford v. Davis ..	99
Hari Ram v. Gopi Kishan..	484	Het Ram v. Baldeo ..	508
Hari Ram v. Hukamchand.	283	Hewett v. Murray ..	364
Hari Sadhan v. Shib Gopal ..	554, 620		

	Page		Page
Hill v. Cooper ..	365	Huro Prasad v. Kali Prasad ..	380, 381
Hilliard v. Hanson ..	818	Hurro Soonduree v. Brojo Gobind ..	652
Hills v. Webber ..	366, 369	Hurro Soonduree v. Bungsee Mohun ..	822
Himatram v. Khushal ..	271	Hurrosoondary v Jugo bundhoo ..	785
Himmat Singh v. Bhagwat ..	261, 263, 416, 526	Husain Sahib v. Babaji ..	863
Himayat Ali v. Mansukh ..	295	Hussain v. Mulo ..	503, 505
Hindley v. Joynarain ..	158	Hutt v. Shaw ..	91
Hirachand v. Nemchand ..	137	H. W. Parmer v. Cowasjee ..	160
Hira v. Ghulam ..	661	Hymas v. Ogden I. ..	875
Hira Lal v. Chundra Kanto ..	625		
Hira Lal v. Dvija Chandra ..	785		
Hira Lal v. Karimunnissa ..	624		
Hira Lal Mukerji v. Premamoyee Debi ..	275		
Hiralal v. Gopika ..	776		
Hirasingsh v. Ghulam ..	521, 662		
Hira v. Tek Chand ..	500, 503		
Hira v. Unas ..	441		
Hirsch v. Coates ..	112		
Hitendranath v. Rameswar ..	669		
Hiwa Mal v. Karunamoy ..	801		
Hoare v. Gray ..	878		
Holmes v. Millage ..	166, 362, 363, 369, 370		
Holmes v. Russell ..	568		
Hood Barrs v. Heriot ..	105, 169, 365		
Hooper v. Lane ..	46, 817		
Hormasji v. Keshav ..	124		
Ho Syew Waing v. P.R.P.L. Chetty ..	290		
Hounsfield v. Drury ..	827		
Howall v. Metropolitan Dist. Ry. Co. ..	105, 106, 118		
Howe v. Smith ..	434		
Hoymobutty v. Korrona ..	169		
Hubeebool v. Allender ..	622		
Hudson v. Morgan ..	375		
Huffer v. Allen ..	825		
Hughes v. Lipscombe ..	439		
Hukam Chand v. Ganga Ram ..	463		
Hukum Chand v. Kamalanand ..	275		
Hukam Singh v. Raghubir ..	272		
Hukumchand v. Kamalachand ..	533		
Hulbert v. Carthcart ..	173		
Hull, Re ..	102		
Huntley v. Simpson ..	819		
Huree Madhub v. Hem Chunder ..	714		
Hurbuns v. Bhairo Pershad ..	459, 618, 623		
Hurmozi Begam v. Ayesha ..	858		
		I	
		Ibrahim v. Ghulam Hussai ..	39
		Ibrahimbai v. Kabulabai ..	324
		Ibrati v. Sangaram ..	822
		Ideal Bedding Co. v. Holland ..	366
		Imam Bundee v. Mirija ..	307
		Imam-un-nissa v. Liakat Hussain ..	542
		Iman Din v. Puran Chand ..	664, 661
		Imbiazi v. Dhuman ..	606
		Imbichi Koya v. Kakkunnat Upakki ..	319, 313
		Imatiaz v. Bishambhae ..	196
		Inaitullah v. Punjab National Bank Ltd. ..	464, 465, 558
		Inayat v. Sadik ..	791
		Indaji v. Cooverj ..	842, 856
		Inder Deo v. Gawri Shankar ..	375
		Iqbal v. Ezaz ..	441
		Iqbal Jahan v. Mummeiy ..	861
		Iqbal Narain v. Jaskaran ..	21
		Intizam Ali v. Narain Singh ..	557
		Intizan v. Narain ..	464
		Isban Chandra v. Dulal Chandra ..	790
		Ishan Chunder v. Beni-Madhub ..	800
		Ishane Dasi v. Gopal Chandra Day ..	115
		Ishan Das v. Parmanand ..	918
		Ishar Das v. Asaf Ali ..	581
		Ishvar Lakshmidat v. Harjivan Ramji ..	487
		Ishwardas v. Dosibai ..	785
		Ismail v. Visvanadhan ..	589, 596
		Issar Singh v. Udhav Das ..	637
		Iswar v. Jai Narain ..	916
		Ithacharan v. Velappan ..	293
		Ittiachan v. Velappan ..	663
		Itraí Kuar v. Raja Ram ..	914

J	Page		Page
		Jaikrishna v. Bibi Soghra	
			193, 702
Jabannessa v. Majdunnessa	364	Jainulabdin v. Kirishna	
Jaburans v. Ekram Kai	797	Chettiar	918
Jadab Lal v. Debi Lal	708	Jairaj v. Debi	161
Jadab Krishna v. Apsarddin	596	Jairag v. Radhakrishna	803
Jadunath v. Afzal Khanam	513	Jairam v. Atmaram	365
Jadunath v. Aswani Kumar	617	Jaistee Ram v. Bijai	547
Jadunath v. Jagmohandas	859	Jalari Rama Krishnayya v.	
Jafar Mirza v. Bhagwan Das	146	Paida Seshana Chetty	252
Jaffer v. Budge Budge Jute		Jamahar v. Askaran	430
Mills Co.	106, 143	Jambu Ammal v. Natarajan	519
Jagdhari Rai v. Langat Gope	460	Jamhu Das v. Jaiprakash	778
Jagadish Chanara v. Kripa-		Jamna Prasad v. Raghunath	136
nath	867	Jaminimohan v. Chandra	
Jagadish v. Bama Sundara	552	Kumar	457, 619, 632
Jagadish Chanara v. Kripanath		Janakdheri Lal v. Gossain	
	867	Lal	536, 571
Jagadish v. Harihar	518	Janaki v. Kamalathammal	807
Jagadish v. Rama Sundara	166	Janardhan v. Ramchandra	377
Jagdish v. Sureswar	637	Janakbati Chaudhrani v.	
Jagannatha v. Gangireddi	805	Rameshwar Singh	452
Jagannath v. Baldeo	507	Janglimal v. Pioneer Flour	
Jagannath v. Basant Ram	35	Mills	137
Jaganath v. Behari Lal	787	Jankidas v. Sandal	136
Jagannath v. Budhwa	719	Janakvati v. Rameshwar	469
Jagannath v. Chitragupta	428	Jan Ali v. Jan Ali Chowhry	571
Jagannath v. Daud	486, 618, 636	Janki Das v. Badrinath	725
Jagannath v. Debi Prasad	21	Jang Bahadur v. Hanvant	
Jagannath v. Ganesh	304	Singh	889
Jagannath v. Jagjiwan	578	Janki Das v. Mohabir	
Jagannath v. Makund	630, 632	Prasad	518
Jagannath v. Pir Mohammad		Janki Kuer v. Banamamala	
	486	Ramanuja Jeer	796
Jagannath v. Ram Phal	882	Jan Muhammad v. Ilah	
Jagannath v. Taraprasanna		Baksh	776
Ganguli	160	Janki Nath v. Baikunt Nath	909
Jagannath v. Watson & Co.	491	Jankiprasad v. Ghulam	121
Jagannath v. Kartick	501	Janukdharilal v. Gossain Lal	571
Jagat Chunder v. Iswar		Jarvis, <i>Re</i>	171
Chunder	102	Jashimudding v. Manmohini	340
Jagat Narain v. Dundhey		Javerbhai v. Gordhan	22
Rai	864	Javherbai v. Haribai	453
Jagirdar Ram Rao v. Kotti-			467, 472
ppi Thimmareddi	149	Jawahir Lal v. Jolal Din	219
Jagmohan v. Baccha	486, 578	Jawahir Singh v. Rajendra	718
Jagneswar v. Kailash-		Jawahur Singh v. Sewa	
Chandra	639	Singh	519
Jahangir v. Hira	87, 135	Jayanti Subbayya v. Alamelu,	
Jahar v. Ramini Debi	645		710
Jahnavi Peasad v. Gharba-		Jayarama v. Vridhagiri	431, 620
ran Dubey	515, 661	Jechand v. Aba	162
Jaibhadar Jha v. Matukdhari		Jeevappa v. Jeerji	515
Jha	433, 466	Jelks v. Hayward	95
Jai Bhagwan v. Buali Baksh	380	Jeoni v. Bhagwan	295, 327
Jai Inder Bahadar v. Sheo		Jetha Bhima & Co. v. Lady	
Inder Bahadar	770, 771	Janbai	221, 226

	Page		Page
Jeynarayan v. Ismail ..	260	Jones v. Jagyar ..	173
Jhan Chandar Das v. Rajadi		Jones v. Robinson ..	56
Kanta Pal ..	689	Jones v. Thomson ..	107, 108
Jhara Biswas v. Amrita-		Joobraj v. Gour Buksh ..	468
moyi ..	788	Joravarmull v. Jeyogopal-	
Jhatu Sahu v. Babo Ram ..	193, 200	dass ..	434
Jhoomuck v. Rajah Radha		Jotindra Chandra v. Rangpur	
Persad ..	620	Tobacco Co. ..	864
Jhummon v. Dinoonath ..	140	Jotindra Mohan Roy v.	
Jhunkoo Lal v. Peary Lal	372	Brojendra Kumar ..	590
Jibhai Mahipati v. Parbhu		Jotindro v. Dwarkanath ..	190
Bapu ..	198	Jotoni v. Amor Krishna ..	92
Jiban v. Sripathicharan ..	148	Jowala Singh v. Dwarka Das	147
Jit Bhagat v. Sheik ..	337	Joy Gobinda Chowdhury v.	
Jitmal v. Jwala Prasad ..	198	Debendranath ..	771
Jitmal v. Zumberlal ..	535	Joy Kalee v. Chand Malla	823
Jitmand v. Ramchan ..	209	Joy Narain v. Goluck	
Jivan v. Hira ..	134	Chunder ..	652
Jiwandas v. Janki ..	21	Joy Prokush v. Abboy	
Jiwani v. Nathumal ..	293, 299	Kumar ..	272
Jiwan v. Haji Oosman ..	142	Joytara v. Mahomed ..	629
Jiwan Singh v. Sawan Mal	486	Judoonath Roy v. Ram Baksh	
Jiwat v. Kalichurn ..	7	..	431
Jnan Chandar v. Rajani		Jugal Kishore v. Bejoy	
Kanta ..	124	Kishna ..	295, 299
Jnanendranath v. Kumar		Jugal Kishor v. Chinta-	
Jogendra ..	524	money ..	785
Jnanuda v. Nakulesvar ..	795	Jugdeo Narain v. Raja Singh	331
Jananendra v. Umesh Chandra		Jugdeo Singh v. Habibulla	718
..	908	Juggernath v. Kishen	
Jodhan v. Kapilnath ..	175	Pershad ..	140
Jodoonath v. Brojo Mohan	455	Juggobundhu v. Ram Chun-	
Joganarain v. Badridas ..	578	der ..	887
Jogendranath v. Hiranya		Juggodamba v. Puddomoney	365
Kumar ..	788	Jugobundhoo v. Bhugwan ..	196
Jogendra Nath v. Manmotha		Jugraj v. Kissan Singh ..	387
Nath ..	614	Jumal Ali v. Tirbhee Lall ..	488
Joge Narain v. Bhugani ..	613	Jumnomal v. Gurdinomal ..	519
Jogendra v. Debendra ..	171	Jung Bahadur v. Mahadeo	
Jogendro v. Gobind ..	417	Prasad ..	486
Joggabundu v. Ram Chundur		Jury Bahadon v. Mohadeo	
..	188	Prasad ..	638
Joggeswar Mahata v. Jhapal		Jungli Lal v. Laddu Ram ..	515
Santal ..	566	Juranu v. Jathi ..	678
Joggobundu v. Purnamund	887	Jwala Prasad v. Ram Narain	503
Jog Narain v. Badri Das ..	606	Jwala Prasad v. Sukhdei ..	169
Johan Buksh v. Mohammad		Jwalasahai v. Masiat	568, 661
Taslim ..	769, 770		
Johns v. Pink ..	128		
Johnson v. Diamond ..	107		
Johnson v. Leigh ..	55		
Johnstone v. Boyes ..	439		
John Tiel & Co. v. Abdool			
Hye ..	361		
Jokhee Lall v. Coms Kooer	776		
Jones & Co. v. Coventry ..	149		

	Page
Kachu v. Trimbak ..	601
Kedarnath v. Behari Lal ..	821, 828
Kadir Buksh v. Jwala Parasad ..	718
Kadir Hussain v. Hussain ..	568
Kaily Prasonno v. Dinonath ..	665
Kaleechurn v. Bungshee 140,	292
Kalee Prosunno v. Dinonath	623
Kalian v. Jagan Prasad ..	792
Kalian Singh v. Jagan Prasad ..	794
Kaliappan v. Faradarajulu	863
Kaliaperumal v. Chidambara	515
Kali Charan v. Jewat ..	265
Kalicharan v. Shara Ali ..	786
Kali Charan v. Sharaf Ali ..	790
Kalidas v. Prasauna Kumar	424, 784, 800, 802, 805, 806
Kali Kanta v. Shyam Lal ..	486, 638
Kali Kishore v. Guru Prasad	475, 478
Kali Mohun v. Anandamoni	491, 668
Kalinga v. Narasimha	576, 593, 595
Kali Prasad v. Anand Roy ..	170
Kali Shettathi v. Shamarau	638
Kalka Prasad v. Sitla Baksh	340
Kallar Singh v. Moril Mahton ..	580
Kallar Singh v. Toril Mahton ..	298
Kallu Mal v. Brown ..	298
Kallu Mal v. Shamsudbin ..	353
Kalu Saha v. Bhagbati ..	614
Kalyan v. Jagan	783, 796, 797
Kalytara v. Ram Coomar ..	618
Kamalakanta v. Durgakumar ..	291
Kamalattanoi v. Ranga Aiyangar ..	295
Kamalkumar v. Kalimeah ..	807
Kamal Narain v. Sat Narain	215
Kamana Venkataswami v. Godavarti Nagayya ..	636
Kamayya v. Bhimara Setti	889
Kamatchiammal v. Pitchu Iyer ..	8
Kameshwar v. Harbans	472, 477
Kaminee Debia v. Issur Chunder ..	300
Kaminee v. Gourmoney ..	623
Kamini Debi v. Ramlochan Sirkar ..	449

	Page
Kamisetti Peda Venkata Subbayya v. Tangatur Subbayya ..	417
Kanahia v. Kali Din ..	31
Kanailal v. Manoo Bai ..	373
Kanai Prasad Bose v. Harichand ..	663
Kannappan v. Ukkaran ..	663
Kanaye Pershad v. Hurchand ..	828
Kanaye v. Hurchand ..	463
Kanchan v. Kamala	779, 808
Kanchan Mandar v. Komala Prasad Chowdri ..	801
Kanchedi v. Kanchedi ..	252
Kandaswami v. Rangasami	778, 802
Kandasami Asari v. Swaminatha ..	486
Kandasami v. Swarnavelu	576, 578
Kandaswamy v. Maruda Pillai	
Kangal Chandra v. Gopi Nath ..	606
Kanhaiya Lal v. Bansidhar	719
Kanhaiya Lal v. The National Bank of India Ltd.,	331, 603
Kanhai v. Bank of Upper India Ltd., ..	430
Kaniz Mehdi Begum v. Rasul Beg ..	548
Kaniz v. Muhammad Jafar	785
Kaniz Menal v. Kabul Beg	916
Kanjan v. Arup ..	916
Kanji Mal v. Bibi Sailo ..	619
Kanji Mal v. Kedarnath	4, 9
Kannappa v. Annamalai ..	852
Kannappa v. Sambasiva ..	822
Kannayya v. Ramanna ..	654
Kannizak v. Monohur ..	779
Kantairam v. Kalicharan ..	919
Kanthi v. Banki Lal ..	486
Kapurchand v. Kanhaiya Lal ..	784
Karalia v. Mansukhram ..	121
Karamali v. Tamijuddin ..	593
Karamat v. Mir Ali	633, 631
Karamuddin v. Jewant ..	344
Karamuddin v. Niamut	770, 776
Karanat v. Mir Ali ..	600
Karan Khan v. Dangushti ..	141
Karaturi Satyanarayana v. Gopisetti Narayanaswami	195, 197, 198, 200
Karnimbhai v. Conservator of Forests ..	405

xxxii THE LAW OF EXECUTION

	Page		Page
Karimulla v. Mohammad Raza	.. 589	Kazee Bunday v. Romesh Chunder	.. 786
Karimunissa v. Phul Chand	119	Kedarnath v. Chandu Mal.	22
Karsan v. Ganpatram	300, 310	Kedar Nath Chatterji v. Rakhal Das Chatterji	.. 316
Kartick Chandra v. Nagendra Nath	.. 615	Kedar Nath v. Kalichurn	.. 576
Kartic Nath v. Juggernath	860	Kedar v. Protap	.. 518
Kartic Nath v. Purnanund	.. 369	Kedarnath v. Seeva Veyana	246
Karu Lal v. Punjab National Bank Ltd.	.. 232	Kedarnath v. Hemnath	.. 252
Karumwue Venkatasami v. Lanka Tripuriah	.. 822	Kedar Nath v. Umacharan	579, 601, 646
Karunakara v. Krishna	595, 600	Kelly v. Gobind Doss	.. 693
Karuthan v. Subramanya	.. 91	Kemp v. Baerselman	.. 142
Kashee Chunder v. Seetal Chunder	.. 328	Kenaram v. Kailash	.. 434
Kashee Nath Koer v. Deb Kristo Ramanooj Dass	.. 25	Kenaram Pal v. Kinu Mandal	.. 565
Kasheshure v. Greesh Chunder	.. 169	Kerbey v. Denbey	.. 55
Kashi v. Jamuna	.. 427	Kerring Rupchand & Co. v. Murry	154, 156
Kashinath v. Chimnaji	.. 516	Keshab v. Ajadhar	.. 127
Kashinath v. Dhondshet	.. 797	Keshab Chandra v. Ajahar Ali	.. 88
Kashi Nath v. Surbanand	194, 646	Keshabdeo v. Radha Prasad	633
Kashi Ram v. Mani Ram	.. 866	Keshab Lal v. Ram Lochan	295
Kashmira Singh v. Haumanta	.. 694	Keshawe Surendra v. Devendra-bala	203, 518, 619, 621, 787, 808
Kashmiri v. Hatim Ali	.. 578	Keshobati v. McGregor	.. 376
Kashynath Roy v. Surbanand Shaha	.. 193	Keshobati v. Mohan Chandra	.. 169
Kasinath v. Sadasiv	.. 119	Kesrinarain v. Abdul Hasan	905
Kasinath v. Uthumansa	.. 914	Kewney v. Attrill	.. 173
Kasi Visvanathan Chettyar v. Ramaswami Nadar	.. 213	Khadar Hussain v. Hussain Saheb	.. 661
Kashi Ram v. Mani Ram	.. 866	Khadar Hussain v. Kalu Pershad	.. 201
Kasi Visvanathan Chetty v. Murugappa Chetty	.. 524	Khadir Bux v. Emp.	.. 12
Kasivisvanathan v. Somasundaram	12, 542	Khagendra Nath v. Sonatan Guha	.. 124
Kassee Nath v. Hullodhur	.. 462	Khagendra v. Pran Nath	627, 652
Kassisa v. Cithaldas	272, 279	Khagendra v. Shashaddar	.. 355
Kasturi v. Arunachalam	536, 622	Khairajmal v. Diam	.. 517
Kasthurai Aiyangar v. Arunachalam	.. 619	Khaira v. Salem Rao	.. 486
Kasturi v. Venkatachalapathi	805	Kablil v. Gokul	.. 451
Kasumri v. Beni Prasad	.. 4	Khan v. Ali Mahomed	.. 171
Kathiresan v. Ramasami	.. 611, 612	Khan v. Alli	.. 373
Kathum Sahiba v. Hajee Badsha Sahib	208, 399, 402	Khandi Subbayya v. Nadra Subba Reddi	.. 203
Katori v. Ajudhia	.. 469	Khaim v. Karlier	.. 148
Katwar v. Ram Tiwari	.. 566	Khelut Chunder v. Bhuggobutty	287, 291
Kattayat Pathumy v. Raman	917	Khetrapal v. Mumtaz	.. 352
Kavribai v. Mehta & Sons	.. 232	Khetsing v. Radha	568, 662
Kawtha Suryanarayana v. Yarudala Venkayya	.. 137	Khetra Nath v. Faizuddin	.. 491
		Khetra Nath v. Mahomad	.. 604

TABLE OF CASES CITED xxxiii

	Page		Page
Khiali Ram v. Bao Zaburullah Khan	.. 566	Klauber v. Weill	.. 118
Khirajmal v. Daim	176, 544, 559, 568	Kocherlakota Venkata Krishna Rao v. Vadive Venkappa	887
Khirode v. Jankidas	.. 806	Kocherla Sethamma v. Pillala Venkataramayya	.. 137
Khisal v. Ukiladdi	.. 786	Koch v. Mineral Ore Syndicate	.. 111
Khivraj v. Lingaya	.. 712	Kokil Singh v. Edal Singh	486, 635
Khoda Bux v. Budree Narain	.. 667	Kolandai v. Sankara	.. 147
Khodeja v. Johad	.. 620	Kollantavida v. Tirubatil	.. 775
Khub Chand v. Kalias	.. 694	Kommachi v. Pakker	.. 860
Khub Chand v. Narain Singh	.. 616	Kommineri Appayya v. Mangala Rangayya	.. 728
Khuda Baksh v. Aziz Alam	770, 779	Konappa v. Janardan	509, 715
Khusalchand v. Nandram	221, 378	Kondama Naidu v. Venkata-lakshmi	.. 790
Khushal v. Bhimabai	.. 507	Kondapatti Tatireddi v. Rama Chandrarao	.. 454
Khyratali v. Syfoolah	.. 775	Kooldip Singh v. Juggurnath Singh	.. 490
Kidar Nath v. Ganesha Mal	104	Koonwar Bijoy v. Sharma Soonduru	.. 882
Kidarnath v. Radha Kishen	787	Koosumba v. Tuffuzzul	.. 778
Kifayatulla v. Mahabir Prasad	.. 803	Koppaka Chandrayya v. Robert	.. 595
King & Co. v. Davidson	154, 155	Krishna v. Janakiram	199, 201
Kinkar v. Sthiti Ram	.. 546	Krishna v. Motichand	617, 621
Kirpal Singh v. Kedar Nath	458, 619	Krishnama v. Kandaswami	645
Kisandas v. Rangubai	.. 710	Ko Tha Huiyin v. Ma Hnyini	.. 446
Kishan Chand v. E. D. Sasoon	.. 63	Ko Tha v. Mo Huin	.. 455
Kishan Lal v. Ganga Ram	.. 715	Kothandaram v. Murugesu	711
Kishan Lal v. Umrai	.. 556	Koti Venkataramayya v. The Official Assignee of Madras	93
Kishen Coomaree v. Golab Comaree	.. 232	Kothal Mammad v. Pydal Nair	.. 168
Kishen Lal v. Charat Singh	217	Koylash v. Koylash	.. 287
Kishen Lal v. Bharat Singh	216	Koyyanna Chittomma v. Doosy Gavaramma	217, 300, 315, 327
Kishen Lal v. Ummatul Fatima	.. 81	Kolli Nagiah v. Gopala Krishniah	.. 621
Kishen Prosanno v. Narduma	.. 619	Koonamvelli Unnara v. Kunhi Raman	.. 907
Kishori Mohan v. Chunder Nath	.. 916	Korapalu Hengsu v. Gouri Hengsu	.. 622
Kishnasami v. Official Assignee of Madras	.. 209	Kripali v. Pairoo	.. 601
Kishna v. Umrao	.. 639	Kripa Nath v. Ram Lakshmi	595
Kishore Bun v. Dwarkanath	27	Krishna v. Sarasvatula Sambasiva	.. 912
Kishori Dasi v. Mukund Lal	625, 626	Krishna Aiyar v. Raghavaian	773, 774
Kissorimohun v. Harsukh Das	273, 332, 341, 415	Krishna Ayyar v. Muthukumara-sawmiya	.. 728
Kishory Mohan v. Mahomed	551, 802	Krishnabhupati v. Ramamurthi	.. 669
Kishundeo v. Ramrijan	589, 656		
Kishun Lal v. Gururdhwaja	779		
Kishun Lal v. Muhammad	677, 683		

	Page		Page
Krishnabhupati v. Vikrama	331, 800	Kunhi Sou v. Mulloli Chathu	.. 410
Krishnachandra v. Jogendra		Kunja Behari v. Sambhuchandra	.. 614
Narain	.. 571	Kunja Behari v. Tarapada	
Krishna Dass v. Mahomed		Mitra	.. 524
Mian	.. 197	Kunj Behari Lal v. Kandh	
Krishnaji v. Baliram	.. 430	Prasad	.. 298
Krishnaji v. Bhaskar	295, 334	Kunhammad v. Kutty	.. 522
Krishnaji v. Bomanji	.. 620	Kunhayan v. Ithukutti	263, 526
Krishnaji v. Ganesh	506, 507	Kunhi Moossa v. Makki	216, 224
Krishnaji v. Mahadev	.. 232	Kunja Mohan Chakravarthi v.	
Krishnaji v. Vithu	.. 882	Manindra Chandra Roy	.. 514
Krishna v. Kandasami	.. 645	Kunja Behari v. Matu	.. 804
Krishna Kumar Ghosh v. Pasu-		Kunj Behari v. Ram Sahai	718
pati Banerjee	.. 261	Kuppa v. Dorasami	.. 140
Krishna Mal v. Krishna Mal	849	Kuppa Gurukul v. Dorasami	88
Krishnam Soorayya v. Pathma		Kuppusami Chetti v. Papathi	
Bee	.. 348	ammal	.. 728
Krishnan v. Arunachellam	948	Kuppuswami v. Subbaraya	689
Krishnan v. Venkatapathi		Kuruoha Ganga Naidu v.	
	211, 860	Kovvuri Basava Reddy	.. 199
Krishna Gopal v. Hem Chandra		Kuriyali v. Mayan	.. 648
	.. 714	Kushaba v. Pitambardhari	694
Krishna Chandra v. Jogendra		Kuseal v. Bhimabai	.. 507
Narain	.. 518	Kushalchand v. Nandram	.. 393
Kashinath v. Ramachandra	324	Kuttalalingam v. Packiyam	878
Krishnan v. Perachan	.. 412	Kutti v. Subramania	.. 509
Krishna Prasad Roy v. Bepin		K. Y. K. M. Chetty v.	
Behary Roy	.. 326	S. N. V. R. Chetty	.. 341
Krishnasami v. Janakiammal		Kylasa Gounden v. Ramasami	
	.. 450		.. 500
Krishnasami v. Somasundaram			
	310, 350, 353		
Krishnappa v. Abdul Khader			
	217, 342		
Krishnappa v. Panchapa	.. 694		
Krishnappa Prasad v. Kidya-			
nanda	44, 57		
Krishnarao v. Vasudev	.. 613		
Krishnaswami v. Swaminadha			
	.. 429		
Krishnayya v. Unnissa	.. 551		
Krishtokishore v. Rooplall	16, 17		
Kristo Moni Gupta v. Secretary			
of State for India	.. 657		
Kuar Radhika Raman v. Gulzar			
Kuar	.. 486		
Kuleemoodeen v. Ashruf	.. 684		
Kumara v. Srinivasa	.. 777		
Kumar Ramanand v. Bajit Singh			
	.. 647		
Kumbalinga v. Ariaputra	.. 772		
Kumed Bewa v. Prasanna			
Kumar Roy	.. 649		
Kumund Krishna Mandal v.			
Jogendra Nath	.. 689		

	Page		Page
Lakhu Rai v. Kesho Prasad	627, 652	Lansdowne v. Connor	.. 205
Lakshman v. Baisan Singh	908	Land Mortgage Bank v. Ram Ruttun	.. 715
Lakshman v. Govind	769, 770	Land Mortgage Bank of India v. Vishnu Govind	.. 714
Lakshman v. Maru	.. 908	Lanka Gopalam v. Lanka Ratnamma	.. 713
Lakshman v. Narhari	.. 133	Layland v. Pancrod	.. 819
Lakshmana v. Najimuddin	487	Laxmi Narayan v. Purnabai	618, 619, 629
Lakshmana Chetty v. Chinna-thambi Chetty	.. 520	Lecky v. Bank of Upper India	.. 153
Lakshmanaswami v. Rangamma	568, 651	Lee v. Bude & T. H. Ry. Co.	.. 173
Lakshman v. Kutayan	.. 785	Lee v. Dangar, Grant & Coi.	205
Lakshmi Ammal v. Kadieresan Chettiar	.. 302	Legg v. Evans	.. 95
Lakshmi Chand v. Chaturbhuj	.. 868	Leon Sawbollo v. K. V. Seyne Bros	.. 100
Lakshmi Charan v. Sris Chandra	517, 544, 627, 649	Levasseur v. Mason & Barry	366
Lakshminarain v. Kali Prosanno	.. 584	Levinia Ashton v. Madhabmoni Dasi	.. 544
Lakshminarayanappa v. Meloth Raman Nair	.. 410	Levasseur v. Mason & Barry	375
Lakshmi v. Kuttunni	.. 228	Levene v. Maton	.. 206
Lakshmi v. Krishnabhat	.. 622	Lewellyn v. Rowland	.. 118
Lakshmi v. Kuttunni	.. 611	Lewis v. Pontypridd etc. Rly. Co.	.. 28
Lakshmi Kuttiamma v. Marithumma	793, 796	Lingam Krishna Bhupati Devu v. Jogani Venkataswamy	683
Lakshminarasaimba v. Lakshmmammal	595, 601, 638	Lingam Veeraraghava Rao v. Malla Pragada Gurunatha Rao	.. 39
Lakshmi Prasanna v. Rajendra Poddar	.. 642	Livia Ashton v. Madabmoni Dasi	373, 649
Lala v. Narain	.. 907	L. L. Lyncicate Re	.. 28
Lala Das v. Minamal	.. 61	Llewellyn v. Roland	.. 171
Lala Kishore v. Ishar Singh	380	Lloyds' Bank Ld. v. Medway Upper Navigation Co.,	.. 397
Lala Mobarnk v. Secretary of State	.. 628	Lobo v. Babulal	828, 832
Lala Parbhu v. Mylne	.. 799	Lodd Govindass v. Ramdoss	39
Lala Ram v. Thokur Prasad	136, 566	Lohani Bai v. Harak Chard	365
Lala Seva Ram v. Khashi Ram	649, 661, 662	Lokessur Koer v. Purgon Roy	.. 888
Lala Suraj Prasad v. Golab Chand	.. 719	Lokhee Narain v. Kalyapuddo Bandopadhyaya	.. 773
Lal Bahadur v. Abharan Singh	556, 639	Lok Nath v. Amir Singh	.. 822
Lal Bhai v. Kamaluddin	.. 504	Lok Nath v. Thakar Das	.. 336
Lal Bihari v. Nagendranath	636	London Bank v. Uncovenanted Service Bank	.. 861
Lalchand Hiralal Marwadi v. Hasto Bai	.. 321	London Corporation v. London Joint Stock Bank	.. 206
Lalka Singh v. Gursaran Lal	197	London Pressed Hinge Co., Re	.. 206
Lalla Ram v. Lokebas	.. 714	Lord Dillon v. Plaskett	.. 356
Lalman v. Bapulal	.. 623	L. T. Attadies v. R. M. K. Chetty	.. 593
Lal Mohun v. Nunu	457, 623	Lucas v. Harris	.. 366
Lal Singh v. Collector of Etah	.. 394	Lucheput v. Humphrey	.. 201
Latafut v. Anunt	.. 369		

xxxvi THE LAW OF EXECUTION

	Page		Page
Luchman Lal v. Padarath Singh ..	636	Mahabir v. Dhanukdhari ..	620
Luchmee Narain v. Bhyroo ..	232	Mahabir v. Dhuman ..	644
Luchmeeput v. Lekraj Roy ..	622	Mahabir v. Macnaghten ..	447, 449, 917
Lumley, <i>Re</i> ..	105	Mahabir Pershad v. Dhanukdhari ..	632
Lotf Ali Khan v. Futteh Bahadur ..	726	Mahabir Prasad v. Ganga Dehal ..	581
M		Mahabir Pershad v. Markunda ..	684
Macdonald v. Tacquah Gold Mines Co., ..	112, 366	Mahabir Sahu v. Bhirgu Rai ..	486
Macfarlane <i>In re</i> , ..	21	Mahadaji v. Hari ..	378
Macgregor v. Tarinichurn ..	6, 7	Mahad v. Gokaldas ..	828
Machiraju v. Sri Rajah Ranganayakamma ..	300	Mahadeo v. Bholanath ..	550, 622
Mach v. Ward ..	118	Mahadeo v. Dhobi Singh ..	636
Macintosh v. Bidhu Bhushan ..	289	Mahadeo v. Hyder ..	196
Mackenzie v. Ram Peary ..	500	Mahadeo v. Krishnaji ..	391
Mackie v. Warren ..	57	Mahadeo v. Trimbak ..	788, 794, 796
Mac Naghten v. Mahabir Prasad ..	628, 629, 640	Mahadeo v. Vasudev ..	124, 578, 579
Macnicoll v. Parnell ..	364	Mahadeo Prasad v. Dirgbijai Singh ..	286
Madan Lal v. Lal Ambika Baksh ..	169	Mahadeo Prasad v. Gajadhar ..	784
Madan Mohan v. Baroda Sundari ..	488	Mahadeo Singh v. Dhobi Singh ..	430, 548
Madarsah v. Palniappa ..	617, 618	Mahadevappa v. Srinivasa ..	214
Madden v. Chappani ..	451	Mahamed Ali v. Mahabir ..	617, 618
Madhammal v. Sirdar Bibi ..	709	Mahamed v. Sayed Ali Khan ..	628
Madhudas v. Ramji ..	106, 108	Mahamed Serajuddin v. Mt. Atam Bi ..	383
Madho Lal v. Javahir ..	554, 627	Mahammad Emartulla v. Mahammad Didar ..	771, 772
Madho Prasad v. Hansa ..	378	Mahammad Jahur v. Gopalsaran ..	617
Madho Purshad v. Mehrban ..	705	Mahammad v. Sajjad ..	599
Madlidi Dorayya v. Satti Veerayya ..	784	Mahammad v. Secretary of State ..	825
Madukuri Ankamma v. Muvvala Subbayya ..	353, 354	Mahammed v. Mahommed ..	373
Madhusudan Das v. Gobinda Prasad ..	914, 917	Mahammed v. Sukhdeo ..	593
Madhusudan v. Kailash Chunder ..	807	Mahammed v. Tara ..	429
Madhusudan v. Purnachandra ..	472	Mahant Prayag Doss v. Raja of Kalahasti ..	858
Madhusudan v. Rakhal Chander ..	523	Maharaj v. Jagannath ..	916
Madhusuddan v. Rash Mohan ..	614	Maharajadhiraj v. Burodanath ..	6
Maganlal v. Doshi ..	601	Maharaj Bahadur v. Nawal Kishore ..	770
Magan Lal v. Shakra Girdhar ..	505, 712	Maharaj Bahadur v. A. H. Forbes ..	535, 684
Magniram v. Bakubai ..	391	Maharaj Bahadur Singh v. Indar Chand ..	542
Magnay v. Burt ..	827	Maharaj Bahdur Singh v. Jawahir Lal ..	551
Mahaberi Ram v. Ram Bahadur ..	656	Maharaja Bahadur Singh v. Surendra Narayan ..	542, 634
Mahabharat v. Surja Kanta ..	204		
Mahabir v. Anjumannissa ..	804		

TABLE OF CASES CITED xxxvii

	Page		Page
Maharaja Kesho Prasad v.		Mahomed Muzaffar Ali v.	
Harbans Lal ..	786	Bhagvati Prasad ..	867
Maharaja of Bobbili v. Narasaraju		Mahomed Nizamuddin v.	
..	524	Aminuddin ..	617
Maharaja of Burdwan v.		Mahpal v. Ram Bahadur ..	621
Apurba Krishna Roy ..	857, 858	Maijha Singh v. Jhow Lal ..	535
Maharajah of Jeypore v. Raja		Maina Koer v. Luchman ..	613
Lakshminarasim ..	572	Makar Ali v. Sarfuddin ..	678, 679
Maharaja Pratap v. Bhaiani		Makbool v. Bazoo ..	594
Sunderbans ..	889	Makbul Fatima v. Lalta	
Maharaja Shri Jaswantsingji		Kunwar ..	331
v. Secretary of State ..	331	Makhan Lal v. Badri Prasad ..	772
Maharani Dambar v. Rai		Makund Lal v. Priyanath ..	788
Sham ..	169	Makund v. Saraswati ..	787, 788
Mahatha Har Sankar v. Bandhu		Ma Kyin v. Mutu Raman	
Sahu ..	603	Chetti ..	277
Mahbub v. Buksh Elahai ..	852	Ma Min v. Maung Po ..	515
Mahdeo v. Krishnaji ..	391	Malkarjan v. Narahari ..	542, 543,
Madhusudan v. Govinda Pria ..	917	545, 567, 616, 621	
Mahendro v. Gopal ..	648	Mallikarjunudu v. Linga-	
Maheshkanta v. Subai Gope ..	638	murti ..	576
Mahiuddin v. Rangachariar ..	595	Mallika v. Ratanmani ..	140
Mahmud Ali v. Gobind ..	620, 628	Maluka v. Sundarsingh ..	30
Mahomed Abdulla v. Jiwan		Mammed v. Locke ..	501
Mal ..	149	Mamuna v. Roshan Miah ..	194
Mahomed Akbar v. Sukhdeo ..	600	Manager of Raj of Durbangah	
Mahomed Ali v. Kiberia ..	558, 628	v. Ramapat Singh ..	684
Mahomed v. Ayyappen ..	295	Manaji v. Agamita ..	576
Mahomed v. Budhsen ..	670	Manakat Velamma v. Ibrahim	
Mahomed v. Comandur ..	146	Lelbe ..	663
Mahomed v. Hossein ..	828	Manak Chand v. Chheda Lal ..	879
Mahomed v. Mahomed ..	146, 171	Manakchand v. Ibrahim ..	473
Mahomed v. Radhi ..	62	Manak Chand v. Sunder Lal ..	489
Mahomed v. Ram Lall ..	452	Manavikraman v. Anantha-	
Mahomed v. Purundur ..	665	narayana ..	522
Mahomed v. Pitambar ..	203	Mancharam v. Malidas ..	783
Mahomed v. Sakina Begam ..	170	Mancherji v. Thakurdas ..	379
Mahomed v. Sukdeo ..	588	Manchester &c. District Bank	
Mahmood J. in Ramchaibar		v. Parkinson ..	369
v. Bechu ..	627	Manohar Das v. Ram Autat	
Mahomed v. Keshori ..	800	Pande ..	242
Mahomed Hossein v. Kokil Singh		Mandan Lal v. Bhagwandas ..	724
484, 570		Manda villa Ramarow v. Siva-	
Mahomed Hossein v. Purunder		narayana ..	883
481, 491		Manders v. Williams ..	95
Mahomed Jawad v. Mahraj		Mandhyan v. Badram ..	201
Kumar Gopal Saran ..	617	Maneck Lal v. Manilal ..	135
Mahomed Maqbul v. Sayed Ali		Manga v. Changa Mal ..	832
..	630	Mangali Prasad v. Pati Ram ..	717
Mahomed Mira v. Savvasi Vijaya		Ma Ng Ma v. Ma Sheve ..	661
Raghunada ..	447, 623	Manicram v. Ramalinga ..	164
Mahomed Mohideen v. Rama-		Manikka v. Rajagopala ..	126, 601
nadhan ..	613	Manik Lal v. Banamali ..	211
Mahomed Mubarak v. Sahu		Maniklal v. Lakha ..	136
Bimal Prasad ..	193	Manikram v. Rama Motor ..	799,
Mahomed Musa v. Aghore		805	
Kumar ..	124	Manilal v. Tar ..	710

xxxviii THE LAW OF EXECUTION

	Page		Page
Manilal v. Motibhai ..	119	Mathuradas v. Panhalal ..	378,
Manilal v. Nanabhai ..	851, 855		488, 672
Maniram v. Lachmandas ..	618,	Mathura Das v. Jamna	
	620, 629	Prasad ..	489
Manjappa v. Ganapathi ..	821, 823	Mathura Das v. Nathun	
Manjunath v. Venkatesh ..	786	Lall ..	455
Manmal v. Dashrath ..	505	Mathuranath v. Nobin	
Manmathanath v. Rakhal		Chandra ..	486
Chandra ..	40	Mathuraprasad v. Gawri	
Man Mohan v. Gopinath ..	679	Shankar ..	470
Manning v. Mullins ..	366	Mathura Prasad v. Ram Lal	587,
Mannu Lal v. Harsukh Das	310,		588
	313	Mati Lal v. Russick Chadra.	668
Manohar Das v. Ram Autar		Matungini v. Monmotha	
Pande ..	223	Nath ..	579
Manson v. Golam ..	680	Maula Bux v. Raghubar ..	486
Manyam Subbayya v. Sunkara-		Maung Aung Ban v. Maung	
valli Venkataratnam ..	223	Shwe Po ..	571
Mayarath v. Venkatesh ..	783	Maung Ba v. Lan ..	336
Mo Nyein v. Maung Gyi ..	266	Maung Chit Hlaing v. N.A.R.M.	
Maowa v. Mahomed Tambi	551,	Chetty Firm ..	446, 558
	654	Maung Kun v. Ma Nan ..	613,
			629
Maradugula Venkataratnam v.		Maung Kyin Pein v. Mi Pwa	
Kolata Ramanna ..	289	Me ..	424
Marangami v. Karupti ..	165	Maung Kyni v. Ma Pwa Me.	806
Mariappa v. Karihara ..	587	Maung Lun Bye v. Maung Po	
Marimuthu v. Subbaraya ..	655		121, 462
Marshall v. James ..	281	Maung Maung v. Maung San	
Martand v. Dhondo ..	453	Nyein ..	690
Martand v. Vinayak ..	16	Maung Nyan v. Ko Maung	96
Marthamma v. Kittu Sheregara		Maung Pa v. Abdul Ganni..	879
	253	Maung Po v. Annamalay	536,
Marulasidda v. Siddalinga..	371		639
Maruthamalai v. Paiani ..	518	Maung Po v. Somasundaram	290
Masarut-un-nissa v. Adit		Maung Pu v. Maung Aung.	348
Ram ..	503	Maung San v. Maung Lun..	293
Masein v. Lachmanan ..	340	Maung Shwe v. Maung Shwe	636
Mashim Isphany v. N.A.P.K.		Maung Ta Te v. Maung	
Chetty Firm ..	411	Nyin ..	866, 230
Masirunnissa v. Joy Chand	784,	Maung Tha Dun v. Chokka-	
	786	lingam ..	645
Masuman v. Gulzari Lal ..	665	Maung Tha v. Maung Shwe.	801
Maszan v. Sarat Kumari ..	785	Maung Tun v. Ma Nkam ..	695
Matadin v. Sheeraj ..	599	Mayan v. Pakuran ..	556, 555
Mata Ghulam v. Sital		Mc. Connel v. Mayer ..	807
Prasad ..	518	Mc. Keown v. Joint Stock Insti-	
Mata Palat v. Beni Madho.	39	tute ..	28
Mata Prasad v. Mt. Audan		Mc Maunas v. Fortesque ..	434,
Kuar ..	122, 139		439
Mathathil Krishna Menon v.		Mendi Prasad v. Nand	
Collector of Malabar ..	595	Keshwar ..	705
Mathewson v. Shyam Sunder		Meghraj v. Abdul Kajid ..	9
Sinha ..	410	Mear Baksh v. Sanjhe Khan	
Mathuji v. Kondaji ..	378		556, 639
Mathuradas v. Fatma ..	618	Meherban v. Mt. Shco Koonwar	
			832

TABLE OF CASES CITED xxxix

	Page		Page
Mehta Barkat Rai v. Mt. Ghulam Fatima ..	515	Mohamed v. Navroji ..	666
Mellin v. Pedley ..	818	Mohamed v. Pitamoar ..	203
Menajuddin v. Toan Mandal.	634	Mohamed v. Sayed Ali ..	619
Mendai v. Bhujja ..	594	Mohammad Abdul Karim v. Nawal Singh ..	394
Mercantile Investment & Co. v. River Plate &c. Co. ..	365	Mohammad v. Akial ..	463
Messer v. Boyle ..	356	Mohan Krishna v. Har Prasad ..	518
Meyyappa v. Chidambaram.	240, 244	Mohan Lal v. Pumayun ..	262
M. G. Mra Tun v. U. Kaing.	271	Mohan Manor v. Togu Uka.	718
Mg. Tunu v. Palaniappa ..	332	Mohan Nandp v. Paridas ..	93
Maharajah of Benares v. Patra Kunwar ..	284	Mohendranath v. Bepin Behary Ghose ..	617, 618
Mi Ah Kook v. Mi Bla Mo-Way ..	917	Mohendro Coomar v. Peera Mohun ..	618
Miajan Ali v. Rupchandra	234, 236	Mohendro v. Gopal ..	491, 635
Mian Jan v. Man Singh	485, 535	Moheah Chandra v. Issur Chunder ..	409
Middleton v. Price ..	15	Mohideen v. Meara ..	679
Midnapore Zamindari Co. Ltd., v. Narerh Narain ..	40	Mohideen v. Mohamed ..	677, 679
Mikanbai v. Dassimal	363, 364	Mohima Chunder v. Nobin Chunder ..	713, 909
Mina Kumari Bibi v. Bijoy Singh Dudhuria ..	228, 230	Mohinee Mohan v. Ram Kant ..	232, 360
Minakshi v. Kalianarama ..	773, 774	Mohini v. R. ..	13
Mina Kumari v. Jagat Sattani ..	571, 658, 665	Mohiny Mohun v. Bheebun-joy ..	618
Miran v. Atra ..	336, 339	Mohomed Abdul Rahim v. Ram Bharos Ojha ..	728
Mir Khan v. Sharfu ..	41	Mohamed v. Habib ..	916
Miraj Din v. Dilbaga Rai ..	621	Mohomed v. Ram Bharos ..	727
Mirza Mahomed v. Widow of Balmakund ..	367, 542	Mohomed Yusuf v. Mt. Amtul Habib ..	784
Misri Lal v. Pithu Lal ..	459	Mohunt Bhawan v. Khettar ..	196
Mitchell v. Lee ..	105	Mohunt Megh Lall v. Shib Fershad ..	619
Mitthu Lal v. Muhammad Ahmad ..	280	Mohunt Ram Rucha v. Doorga Dutt ..	36
Miya v. Sayad ..	147	Mohuput v. Shaikh ..	88
Mobaruk v. Secretary of State ..	630	Moidin Kutti v. Kunhi Kutti ..	310, 315
Modadagu Perayya v. Peroli Venkayamma ..	340	Moidinsa v. Apsa Bivi ..	521
Modneshwar v. Mohomaya.	368	Moidin Kutti v. Krishnan ..	663
Modun Mahun v. Baroda Soondari ..	491	Moitheensa Rowthan v. Apsa Bivi ..	313, 411, 413
Modun Mohun v. Fatturun-nissa ..	139	Mookhesur v. Ramphul ..	198
Moeser v. Wisker ..	471	Mookhya Huruckraj v. Ram Lall ..	684
Mohabeer v. Collector of Tirhoot ..	361	Moonshee Bazloor v. Shumshoonissa ..	31
Mohabir v. Olpherts ..	617	Moore v. Gardner ..	827
Mohammad Ali v. Mahabir Prasad ..	558, 620, 629	Moore v. Peachey ..	281
Mohamed Mira v. Savvasi Vijaya ..	625	Moothetuth Kanari v. Hari Shenoy ..	520
		Monappa v. Senappa ..	776

	Page		Page
Monappa v. Surappa ..	775	Mt. Buhuns Kowar v. Lala	
Monesur v. Kishen ..	166	Buhooree Lali ..	776
Mongola Swayi v. Visvanatha		Mt. Dhanwanti Kuer v. Sheo	
..	779	Shanker ..	584
Monit Kamoji v. Chodimalla		Mt. Dhoka v. Beharilal	
Ramamurthy ..	22	Khazanchi ..	320
Mon Mohan v. Dwarka Nath	735	Mt. Kanio Zahara v. Rai Syam	
Monmohiney v. Radha Krishto		Kishen ..	203
..	388	Mt. Mahamudunnissa v. Syed	
Mor Joshi v. Muhammad ..	777	Zahib Raza ..	770
Morrish v. Murray ..	55	Mt. Manik v. Ramjas Agarwala	
Morris v. Salbera ..	818	336, 350	
Morshed v. Frederick ..	417	Mt. Muhamaddi Begam v. Mt.	
Morshia Bayaral v. Elahi Bux		Nanda Begam ..	787
Khan	307, 337	Mt. Nainu v. Bhupendranath	
Mortimer v. Wilson ..	28	..	292
Mortimore v. Cragg ..	83	Mt. Naimat-un-nissa v. Raza	
Motabar Hussain v. Muhammad		Ali ..	293
..	422	Mt. Pura v. Behari Lal ..	786
Motahar Hossain v. Mahammad		Mt. Rani Bahu v. Amrit Lal	520
Yakub ..	554	Mt. Sahibzadi v. Muhammad	
Mothu Curpan v. Yagappa	340	Umar ..	78
Mothura Mohun v. Akhoy		Mt. Shakoti v. Jotindra ..	596
Kumar ..	665	Mt. Sharafatunnissa v. Lachmi-	
Moti Lal v. Bhawani	617, 632	narain ..	661
Motilal v. Fulchand ..	446	Muang Ta Te v. Maung Nyin	
Motilal v. Ibrahim ..	785	..	866
Motilal v. Karbuddin	208, 652	Muazzam Ali v. Chunni Lal	394
Motilal v. Ramdoyal ..	453	Mubarak v. Ahamad ..	567
Motilal v. Russick	658, 659	Muchmeeput v. Jugul Indur	233
Motiram v. Bivraj ..	468	Mufti Jalabudden v. Shohorul-	
Motiram v. Ram Gopal ..	392	lah ..	344
Moti Singh v. Kaunsilla ..	345	Muhamed v. Ayyappan ..	295
Moti Singh v. Prithipal ..	457, 458, 619	Muhammad v. Abdul Hakim	769
Moula Bukush v. Kuruck Lall		Muhammad Ahmadulla v.	
..	684	Ahmed Said ..	578
Moulvi Saijid v. Bendeshri	580	Muhammad v. Amarchand	369
Mochi Mandal v. Meseruddin	785	Muhammad Bakhsh v. Bal-	
Modan Lal v. Sayad Muhammad		kishan ..	299
..	128	Muhammad v. Dharam ..	449
Modhusudan v. Rakha Chunder		Muhammad v. Dilsukh	556, 643
..	344	Muhammad v. Dipchand ..	6
Mrs. Goudoin v. Venkatesa	170	Muhammad Hussain v. Mozaffar	
M. R. R. M. Firm v. Zan ..	284	Hussain ..	790
Mt. Anooragee v. Mt. Bhugbutty		Muhammad v. Lachminath	147
..	664	Muhammad Najibullah v.	
Mt. Basso v. Mir Mahomed	409	Jainarain	677, 679
Mt. Babia Bibi v. Kassim		Muhammad v. Payag	121, 378
Hussain ..	929	Muhammed v. Radha Mohan	
Mt. Bhagwanta Koer v. Zamir		..	209
Ahmed Khan ..	536	Muhammad Rahmatullah v.	
Mt. Bibi Khodaijatul v. Harihar		Bachcho	411, 645, 691
..	522	Muhammad Samiuddin v.	
Mt. Bibi Zainab v. Parasnath		Mansingh ..	718
..	601		

	Page		Page
Muhammad Sayed v. Muhammad Ismail ..	392	Murlidhar v. Baldee Singh	600
Muhammad v. Shib Sahai ..	805	Murlidhar v. Goma ..	789
Muhmudunnissa v. Zahid Raza ..	775	Murlidhar v. Mulchand ..	169
Mukat Singh v. Misra Parasram ..	787	Murlidhar v. Narasingh	787, 791
Mukhoda Dassi v. Gopal Chunder ..	571	Murlidhar v. Pitambar Lal	519
Mula Ram v. Jiwind Ram	175	Murlidhar v. Sher Singh ..	717
Mulchand v. Bhup Indro ..	661	Murray & Co. Ltd. v. Prins	156
Mulchand v. Govind	578, 579, 580	Murray v. Murat Singh ..	391
Mulchand v. Mukta Prasad	484, 492, 570	Murugappa v. Karanath ..	828
Mulji v. Anupram ..	504	Murugappa v. Palaniappa ..	855
Mulla Faiz Ali v. Mt. Harkuar ..	340	Musammatt Khairan v. The Alliance Bank of Simla Ltd. ..	588
Mulla Veetil v. Achutan Nair ..	718	Musammatt Ido v. Rulia ..	518, 521
Mul Raj v. Kishon Lal ..	787	Musammatt Sobaran Kuar v. Ude Sah ..	486
Mumtaz v. Abbas ..	577	Mussammatt Mansa Devi v. Rahim Baksh ..	665
Muneshwar v. Kailash Pati	777	Mussat Imrit v. Dalla ..	799
Muniappa v. Subramanya ..	119	Musst. Najmunnissa v. Lala Jamna Das ..	262
Mungat v. Girija Kant ..	198, 783, 786, 790	Musto Dbapi v. Bartam Deo Pershad ..	888
Muni Lal v. Jagannath ..	375	Muthia v. Appasami	912, 914
Muniruddin v. Abdul Rahim ..	487	Muthiah v. Bava Sahib ..	654
Munisami Reddi v. Arunachala Reddi ..	297	Muthiah Chettiar v. Bawa Sahib ..	670
Munishi Lal v. Mahomed ..	367, 371, 863	Muthirulandi Poosari v. Sethurama Aiyar ..	333
Munna Lal v. Radha Kishnan	588, 589, 593	Muthooranath v. Raikomul	776
Munna Singh v. Gajadhar Singh	644, 677	Muthora Nath v. Chundermoney ..	712
Munnireddi v. Venkat Rao ..	443	Muthusami v. Ayyalu ..	317
Munoo Lal v. Lalla ..	798	Muthukarappa v. Panja Kavan-dan ..	522
Munshi Fayazul v. Muhammad Usman ..	568	Muthu v. Karuppan	557, 639
Munshi Kali Shankar v. Maharajah Protap Udainath ..	87	Muthu v. Ramasami ..	596
Munshi Kali Sankar v. Maharajah Prabadanath ..	175	Muthukumara v. Alappa ..	268, 272
Munshi Lal v. Ramnarain ..	466, 588, 589	Muthusami Iyer v. Sree Methanithi Swamiar ..	668
Munshi v. Muhammad ..	164	Muthusami v. Prince Alagia	108, 146
Munusami v. Ammanni ..	168	Muthurakku v. Rakkappa ..	604
Munusami v. Veerabhadra ..	123	Muthuraman v. Ettappasami	719
Munwar Ali v. Taiyabali ..	381	Muthukumara v. Anthony ..	144
Mur Kisur v. Ebrahim ..	503	Muttalagiri v. Muttayyar ..	260
Murari Lal v. Umrao Singh	4	Muttra Pershad v. Ram Pershad ..	381
Murari Singh v. Prayag Singh ..	571	Muttu Karuppan v. Muttu Ramalinga	259, 261
Murlidhar v. Anandrao ..	601	Muzaffaringas v. Budh Singh ..	628
		Myat Gale v. Santha ..	770
		Mydeen v. Md. Abdul Gaffer	796

N	Page		Page
Nabi v. Jwala Prasad ..	786	Nanda Kumar v. Gour Shankar ..	823
Nabin Chandra v. Bipin Chandra ..	636	Nanda Rai v. Raghunandan ..	787
Nadhamuni v. Appu Odayan ..	705	Nand Kishore v. Parao Mian ..	580
Nachiappa v. Mahomed Sahir ..	879	Nanda Kumar v. Govind ..	625
Nadapali Narasimham v. Dronamraju Seetharamamurthy ..	304	Nandlal v. Naresachandra ..	299
Nafar Chander Pal v. Gopal Chandra ..	499	Nandigam Gangayya v. Madupalli Venkataramayya ..	215
Nagbhatta v. Nagappa ..	514, 664	Nandi Kunwar v. Ram Niranjau ..	353
Nagammal v. Venkatagiri ..	712	Nandi Lal v. Jogendra ..	500
Nagappa Chetty v. Muthuraman Chetty ..	785	Nandkiswar v. Kedarnath ..	428, 617
Nagendra Bala v. Debendranath ..	444	Nandlal v. Tola Ram ..	618
Nagendra v. Fani Bhushan ..	299, 300	Nandram v. Kacha Bhavy ..	500
Nagendranath v. Jugul Kishore ..	604, 607	Nanhi v. Bhuri ..	340
Nagendra Nath v. Rakhal Das ..	637	Nanhu v. Malloo ..	299
Nagendranath v. Sambhunath ..	678	Nanjuhdepa v. Hemapa ..	506
Nageshar Prasad v. Srinivas ..	789, 790	Nannu Lal v. Bhagwam Das ..	678
Nageshwar v. Jai Narayan ..	40	Nara Gopal v. Paragowda ..	705
Nagesur Pershad v. Bindeswari ..	613	Narahari v. Vaithinatha ..	822, 832
Nagindas v. Ghelabhai ..	160	Narainan v. Nilakandan ..	343
Nagina Singh v. Puran Chand ..	506, 662, 665	Narain v. Ram Jatan ..	639
Nagoba v. Madholala ..	828	Narain v. Saurindra ..	577, 578
Naharmul v. Sadut Ali ..	645	Narain Das v. Kalu Ram ..	515
Naigar v. Bhaskar ..	506, 507	Narain Das v. Ralli Bros. ..	518
Naimullah v. Ishanullah ..	637	Narain Das v. Ram Chandra ..	777
Naipal Sonar v. Sheo Narain ..	771	Narain Dei v. Durga Dei ..	769
Najmooddeen v. Abdul Azeez ..	629	Narain Sahoo v. Ochoot Sahu ..	717
Nakhola v. Kokayya ..	137, 138	Naraklal v. Thagoo Lal ..	340
Nakori v. Sarup ..	769	Narbadapuri v. Bholanath ..	714
Nalini Behari v. Fulman ..	579	Narbadashanker v. Kevaldas ..	376
Namasivaya v. Kadir ..	143	Narbhe Ram v. Collector of Broach ..	88
Namdar Chaudri v. Karam Raji ..	718	Narendra v. Ganga Sagar ..	197
Namdeo v. Ramchandra ..	907, 908	Narendra Bahadur v. Gopal Singh ..	515
Nanak Chand v. Gujar Mal ..	849	Narendra Bhusan v. Khagendra Bhusan ..	614
Nanak Chand v. Kishen Chand ..	143, 168	Narendranath v. Rakhal Das ..	638
Nanakchand v. Teluckdye ..	509	Narindar v. Sukhkan ..	424
Nana Kumar v. Golam Chunder ..	486, 618	Narasayya v. Jangam ..	505
Nanammal v. Collector of Trichinopoly ..	166	Narasimha v. Anantha ..	140
		Narasimha v. Ramasami ..	568
		Narasimha v. Vijiappa ..	299
		Narasimhachari v. Krishnamachariar ..	261, 850
		Narasimhacharlu v. Pedda Ramayya ..	232
		Narasimham v. Madavarayulu ..	164
		Narasimha Naidu v. Ramasami ..	661

TABLE OF CASES CITED

xliii

	Page
Narasimhulu v. Adiappa	89, 90
Narasimma v. Appalacharlu	334
Narasayya v. Jungam	.. 503
Narasinga v. Govinda	.. 822
Narsing Narain v. Jahi Mistry	.. 518
Narsing Rao v. Magniram	.. 139
Naraprath Kummali v. Param- boli Kandi	.. 409
Narasingarji v. Panuganti	.. 713
Narayan v. Amgauda	607, 609
Narayan v. Keshab	.. 556
Narayan v. Megaji	263, 264
Narayan v. Muhammad	.. 655
Narayan v. Rama Krishnaje	576, 588, 593
Narayan v. Rasulkhan	378, 486, 589, 633
Narayan Sadoba v. Umbar Adam	.. 318
Narayana v. Ayyasami	350, 352
Narayana v. Bhijaraj	.. 353
Narayana v. Gopalakrishna	786
Narayana v. Ranga	.. 140
Narayana v. Kalianasundaram	492, 520, 551, 619, 621
Narayana Iyer v. Biyari Bibi	213
Narayanan v. Kannan	.. 89
Narayanan v. Tawker	263, 264, 266, 268
Narayana Reddi v. Kamakshi Ammal	.. 144
Nash v. Dickenson	.. 83
Nasibunnissa v. Niazunnissa	292
Nasiruddin v. Sayadur Rahman	887, 908
Nasirunnissa v. Ghafuruddin	4
Nasiuddin v. Sayadur Rahman	.. 500
Nasrat Ali v. Sakina Begam	916
Natchappa Chetty v. Mahomed Jan	.. 284
Nataraja v. South Indian Bank, Tinnevely	118, 119
Nataraja Mudaliar v. Rama- swami Mudaliar	.. 774
Natesa v. Venkatrama	773, 778
Natesa Ayyen v. Venkatramayyan	.. 774
Natesa Chettiar v. Annamalai Chettiar	.. 797
Nathan v. Giles	.. 206
Natha Singh v. Jodhau Singh	.. 696
Nathoo Ram v. Raja Bijaya Bahadur	260, 568, 661
Nathu v. Badridas	568, 661

	Page
Nathu v. Hansraj	.. 143
Nathu Mal v. Ganga Ram	.. 215
Nathumal v. Kishori Lal	.. 240
National United Investment Corporation, Re	.. 209
Natthu Ram v. Muhammad Ali Kan	.. 795
Natto Meah v. Nund Rancee	417
Nawab Abdulla v. Kuddan Mal	.. 147
Nawab Mirza v. Amer Chand	369
Nazar Ali v. Kedarnath	528, 661
Nazir Ahshan v. Dalip Mahton	.. 500
Nazir Hussain v. Kanhya Lal	.. 487
N.C. Chatterji v. R. M. K. Karpan Chetty	.. 429
Neate v. The Duke of Marl- borough	.. 356
Neelu v. Subramania	654, 655
Nelthorpe v. Pennymau	.. 471
Nemagauda v. Paresha	295, 319, 323
Nemai Chand v. Deno Nath	635
Neti Anjaneyulu v. Sri Venu- gopal Rice Mill	.. 140
Netieton Perengaryprom v. Tayanbarry Parameshwaran	309, 312, 316
Net Lal v. Sheik	622, 627, 652
Nga Po Tun v. Mi Thon Pon	.. 797
Nga Sah Balu v. Mi Thaik	.. 291
Nga Seck v. Nga Pu	341, 347, 349
Nga Tha v. Burn	.. 280
Nga Tok v. Subramanian Chetty	279, 292
Niadar v. Biddulph	.. 187
Nibaran Chandra v. Chiranjib Prasad	.. 629
Niddar v. Sapit Khan	.. 136
Nidhi Ram v. Parasaram	.. 881
Nihal Devi v. Shib Dial	.. 710
Nilkanta v. Gosto	.. 264
Nilkanta Narain v. Braja- kumar	538, 663
Nilahar v. Magniram	.. 139
Nilakanda v. Thandamma	.. 661
Nilkanta v. Gosta Behari	.. 197, 527
Nilakanta v. Imam Sahib	.. 677
Nilkanth v. Yeshwant	.. 484
Nilkunto v. Hurro Soonduree	168
Nilmani Dey v. Hiralal	862, 864
Nilmonee v. Ramachurn	.. 629

	Page
Nilmoni <i>v.</i> Brinda ..	636
Nilo Pandurang <i>v.</i> Rama Patloji ..	295, 306
Nimbaji <i>v.</i> Vadio ..	850, 861
Ningappa <i>v.</i> Gangawa ..	486, 638
Nirbhay Lal <i>v.</i> Kallon ..	136
Nirode Nath <i>v.</i> Amulya Dhone ..	576
Nisakar Das <i>v.</i> Bairagi Samal ..	769
Nisar Ali <i>v.</i> Madhudas ..	568, 662
Nitta Kolita <i>v.</i> Bishnuram ..	106
Nito Kalee <i>v.</i> Kripanath ..	700
Nityananda <i>v.</i> Gajapati ..	608
Nityananda <i>v.</i> Hiralal ..	578, 503
Nityanand <i>v.</i> Juggat Chandra ..	677
Nizamuddin <i>v.</i> Mt. Jannat ..	164
N.M.K. Chetty <i>v.</i> Chartered Bank of India & Co. ..	290
Nobin <i>v.</i> Kenny ..	106
Nonidh Singh <i>v.</i> Sought Koer ..	535
Noni Gopal Basu <i>v.</i> Tares Chandra ..	778
Nooral Hossein <i>v.</i> Ram Coomar ..	622
Noor Mahomed <i>v.</i> Malik ..	629
Norton <i>v.</i> Yates ..	205, 207
Nundeeput <i>v.</i> Wiguhart ..	444
Nundkishore <i>v.</i> Baneeram ..	164
Nund Lall <i>v.</i> Dilawar ..	625
Nur Ahmad <i>v.</i> Altaf Ali ..	220
Nurjihan <i>v.</i> Girdhari Lal ..	619
Nusser Anjee <i>v.</i> Meer Mynooddeen ..	567

O

Oakes & Co. <i>v.</i> Discarrie ..	153, 187
Obhoy Churn <i>v.</i> Golam Ali ..	261, 264, 514, 851
Obhoy <i>v.</i> Nilambur ..	716
O'Brien <i>v.</i> Killesu ..	285
O'Donovan <i>v.</i> Dillon ..	206
O'Donovan <i>v.</i> Goggin ..	366
Official Assignee of Madras <i>v.</i> Mary Dalgairns ..	160
Official Liquidator <i>v.</i> Sand Narain Singh ..	548
Official Receiver, Madura <i>v.</i> Chettiappa Chetti ..	571

	Page
O.G.S. Life Insurance Limited <i>v.</i> Vanteddu Ammiraju ..	116, 117
O.K. Abdula Brothers & Co. <i>v.</i> Chotalal Sunderji & Co., U.B.R. ..	338
Olagayee <i>v.</i> Ichammal ..	710
Oliver <i>v.</i> Lowther ..	397
Olpherts <i>v.</i> Mahabir ..	629, 630
Oman Prasad <i>v.</i> Jani Durlab ..	788, 789
Omar Ali <i>v.</i> Moonshi Resiruddin ..	614
Omar Chunder <i>v.</i> Soormunlssa Khatoon ..	431
Omroto Lal <i>v.</i> Ramdhun ..	459
Onkar <i>v.</i> Baijnath ..	805
Oojagur Roy <i>v.</i> Ram Khelawan ..	715
Ootum <i>v.</i> Ram Sarun ..	360
Orr <i>v.</i> Muthia ..	171, 358, 374
Ostoche <i>v.</i> Haridas ..	345, 348
Ovanna Perumal Chetty <i>v.</i> Maung Myin ..	426, 866
Owen <i>v.</i> Homan ..	363

P

Pachayappan <i>v.</i> Narayana ..	677
Padmanabha <i>v.</i> Thanakoti ..	38
Padmanand <i>v.</i> Ram Proshad ..	168, 169, 370
Padu <i>v.</i> Rakkamai ..	504, 506
Page <i>v.</i> More ..	856
Pahalwan <i>v.</i> Narain ..	859
Pahlad <i>v.</i> Sajivan ..	491
Pain <i>v.</i> Wittaker ..	94
Palancheri Govinda Menon <i>v.</i> Krishna ..	787
Palaniappa <i>v.</i> Arumuga ..	629
Palaniappa <i>v.</i> Sadagopa ..	412, 690
Pala Singh <i>v.</i> Harnama ..	666
Pala Singh <i>v.</i> Waryam Singh ..	667
Palikandy <i>v.</i> Krishnan ..	157, 161, 166, 370
Pallonji <i>v.</i> Edward Vaughan ..	241
Palmer <i>v.</i> Temple ..	434
Palneappa <i>v.</i> Maung Shew Ge., U.B.R. ..	342
Palniappa <i>v.</i> Palniappa ..	375
Panaru <i>v.</i> Baldeo ..	627
Pana Seenev <i>v.</i> Ana ..	362, 363
Panchaman Das <i>v.</i> Kunja Behari ..	417

TABLE OF CASES CITED

xliv

	Page		Page
Pancham Lal v. Kishun Pershad ..	639	Parvati Charan v. Gobinda	449
Panchanan v. Dwarka Nath	275	Parvathi v. Govindasami ..	681
Panchanan v. Kunja Behari	551	Parwat v. Ramji ..	391
Panchanan v. Sukhamoy ..	916	Pasumarti v. Ganti ..	621
Panchkeri v. Hari Dasjati ..	604	Patel v. Haridas 263, 264, 526,	527
Panch v. Mani ..	429	Pathumabi v. Vittal Ummachabi ..	709
Panchu Muchi v. Bhuto Muchi ..	293	Patitshahu v. Hari Mahanti	628
Pandit Hanuman v. Mufti	803	Patracharia v. Ramasami Chettiar ..	772
Pandu v. Goma ..	706	Patring Koer v. Madavanand ..	204
Pandurang v. Govinda ..	575	Pattab Singh v. Bhabuti Singh ..	518
Pandurang v. Krishnaji 126, 566, 601		Patturam v. Kaminimai ..	594
Pandurang v. Sampal ..	889	Payapa v. Padmapa ..	321
Panba v. Fatta ..	504	Payidamma v. Lakshminarasamma ..	517
Pankabati Choudharani v. Nonihal 580, 604		Payidanna v. Lakshminarasanna ..	654
Panna Lal v. Bhagirathi Bai	285	Payne v. Cave 432, 434	
Pannah Lal v. Sri Ram ..	619	P.C., Syed Murul v. Sheo Bahai ..	799
Panna Lall v. Kanhaiya ..	62	Peachy v. Bishen Das ..	381
Pannu Thevappa v. Sath Chetty ..	246	Peare Mohun v. Gosto Beharv ..	684
Papuji v. Satyabhamabai ..	715	Peari Lal Singh v. Chandi Charan Singh 552, 705	
Paquine v. Snary ..	166	Peddi Venkata Subbiah v. Tangatoor Subbiah ..	202
Parabhu Narain Singh v. Lalj Singh ..	38	Peela Yarakaya v. Venkatakrishnamraju 295, 296	
Paragi v. Gauri Shankar ..	140	Peer Mahomed Devji v. Mahomed Ebrahim 123, 411	
Paramasiva v. Krishna ..	453	Peetiyakkal Vattaka v. Marakkarakath Ahammad 527	
Paramasiva v. Pulukaruppa	654	Permraj v. Narayan ..	333
Paranjpe v. Radane ..	648	Penara Shukul v. Baldeo Sahai ..	550
Parashram v. Balmukund ..	649	Pentacota Gareebu v. Pentacota Peddarayadu ..	593
Parashram v. Gobind ..	128	Periakaruppan v. Chidambara 785, 786	
Parasurama Ayyar v. Seshiyer ..	572	Periasami v. Krishna ..	121
Paran v. Lalji ..	780	Periasami v. Muthia ..	22
Parasuraman v. Viraraghava	868	Pemmetta Subbaraju v. Veegasena Seetharamaraju 408, 411	
Parat Veethil Seethi v. Ambalatu Veethi Kolathus Ahmed ..	588	Perkins v. Meacher ..	56
Parbat v. Bindraj ..	478	Peru v. Ronno ..	88
Paresh Nath v. Hari Charan	571	Pethu v. Sankara Narayana	203
Paresh Nath v. Nabogopal 577, 578		Petram v. R. N. Mudaliar	878
Parvathi v. Govindasami ..	682	Pettachi v. Chiunnathambiar 688, 708	
Paresh Nath v. Hari Charan	638	Phani Singh v. Nanab Singh	882
Parja Mai v. Mul Chand ..	636		
Parmer v. Cowasjee ..	90		
Parry v. Great Ship Co. ..	818		
Parshadi v. Muhammad ..	666		
Parshottam v. Ganesh ..	428		
Parasharm v. Balmukund ..	542		
Parekh v. Bai Vakbat 563, 668			
Pareshnath v. Haricharan ..	617		
Partab Singh v. Bhabuti Singh ..	518		

	Page		Page
Philips v. Biron	.. 817	Prahlad Misser v. Udit Narayan	.. 717
Philips v. Naylor	.. 819	Prangour v. Himanta Kumari	488, 491, 508, 661, 662
Philips v. Price	.. 57	Pran Krishna v. Nihya Gopal	.. 663
Phomon hingh v. A. J. Wells	.. 292	Pranjivan Govardhandas v. Bajju	.. 718
Phulchand v. Chandmal	.. 1	Pran Singh v. Janardan Singh	429, 430, 457, 620, 805
Phul Kumari v. Ghansyam Misra	340, 345, 353	Prasad Das v. Jitu Sahu	.. 557
Phulwanti Kunwar v. Janeshar Das	.. 520	Prasanna Kumar v. Asutosh	187
Piara Ram v. Ganga Ram	.. 297	Prasanna Kumar v. Ibrahim	679
Pterce v. Street	820, 819	Pratab Chandra v. Sarat Chandra	.. 217
Pilips v. General Omnibus Co.	.. 818	Pratab v. Delhi and London Bank	.. 366
Piari Lal v. Hani Funnissa	571	Prasanna Kumar v. Jotindra-nath	.. 9
Piari v. Masun	.. 637	Prayag v. Sidhu Prasad	801, 803
Piary Lal v. Ram Chandra	918	Prem Chand v. Purnima Dassee	.. 508
Picton v. Cullen	.. 366	Premchand Dey v. Mokhoda	514
Pinches v. Harvery	.. 818	Premraj v. Jawarmal	.. 515
Piramanayagan v. Ramachandra	.. 769	Prem Chand v. Mokhoda	.. 244
Pirbhu Narain v. Amir Singh	22	Prince v. North	.. 471
Pita v. Chunilal	378, 379, 586, 597, 601	Prins v. Murray & Co.	.. 154
Pitty Theygaraya Chettiar v. Sivapada Mudali	.. 620	Pritchett v. English and Colonial Syndicate	.. 284
P.K.A.C.T. Kadappa Chetty v. Maung Sheu Bo.	281, 287	Proctor v. Nicholson	.. 93
Palaniappa v. Savari	.. 796	Prokash Chander v. Tarachand	503, 506
P.L.M. Firm v. D.M. Stacey	285	Promathanath v. Bejoy Madhab	.. 618
Plomer v. Ball	.. 57	Promode Ranjan v. Aswini Kumar	.. 127
Podurn Lakshmi Narayana v. Ponnada Pallamraju	.. 797	Promothonath v. Souray Dasi	506, 685
Pokhpal Singh v. Chhidu Singh	.. 518	Prosonna Kumar v. Srikanth Rant	.. 410
Pokhray v. Gossin Munraj	620	Prosunno Kumar v. Kalidas	491, 624, 635, 647
Pokker v. Kunhamad	.. 336	Prosonnomoyee v. Sreenath Roy	
Po Kya v. Lutchminappian	271	Protap Chunder v. Arathoor	641
Polti Nayaker v. Suppammal	580	Protap Chunder v. Brojolall	662
Poona Lall v. Kanbayalal	.. 166	Protap Chunder v. Pyari	.. 27
Ponuaka Balarami Reddi v. Hazi Mahomed	327, 329	Protap Chandra v. Ishan Chaudra	.. 718
Ponnurangam v. Lal Khan	208	Protap Chunder v. Panioty	645
Ponnusami v. Sami Ammal	299, 300, 332	Protap Chunder v. Peary	.. 30
Ponnusamy v. Abdul Hafiz	425	Prout v. Gregory	.. 118
Popoonu Venkata Narasimha v. Jayanti Lakshminarasimham	.. 587	Pucha Lal v. Kunj Behari Lal	.. 124
Potts v. Warwick and Birmingham Canal New Co.	.. 129	Pudmanand v. Chundi Dat	24
Potu Begum v. Indurjeet	.. 484	Puddomonee Dossee v. Roy Muthooranath	.. 217
Prabhulingappa v. Gurunath	786		
Pradyot Kumar v. Isri Ram	801		
Pragji v. Assa Jalal	.. 612		
Prag Lal v. Fatehchand	137, 140		

	Page
Pulchand v. Chand Mal ..	107
Pulchand v. Nursing ..	601
Pullamma v. Pradosham ..	298
Punchanan v. Rabia Bibi ..	914
Puncha Thakur v. Bindeshri	140
Pankhabati Choudharani v. Noni Hal Singh ..	604
Puran Mal v. Ali Khan ..	779
Purbhoo v. Goma Bhujun ..	301
Purgan v. Dhanpat	688, 804
Purnachandra v. Bejoychand	513, 518
Purna Chandra v. Dinabandhu	538, 661, 663
Purushottam v. Balwant ..	88
Purushottam v. Purushottam	613
Purushottam v. Suraj	852, 855
Pydanna v. Lakshminarasimma ..	662

Q

Qamaruddin v. Jawahir Lal	196
Q. E. v. Shaik Ibrahim ..	88
Quarban Ali v. Ashraf Ali ..	212
Qul Mahomed v. Faiz Mahomed ..	134

R

Radha Gobind Shaha v. Brijendro Coomar Chowdhri	37
Radha Kanta v. Ramanand	801
Radhakishen v. Radha Pershad	39
Radha Kishun v. Hemchandra	127
Radha Kishore v. Aftab Chandra	198, 361
Radha Kconwar v. Jankee Boonwar ..	662
Radhakrisan v. Balvant ..	134
Radha Krishna v. Ram Bahadur ..	705
Radha Mudhob v. Kalpataru Roy ..	409
Radha Madhub v. Sasti Ram	604
Radhanath v. Jadoonath ..	298
Radha Prasad v. Lall Sahab	176, 305
Raghavachariar v. Anantbarreddi ..	196, 203

	Page
Raghavachariar v. Murugesamudali	485, 670
Raghubar v. Banke Lal ..	261
Raghubar v. Sattoo ..	784
Raghubar Singh v. Gokaran	783
Raghunath v. Sarosh ..	330, 331, 351
Raghunath Singh v. Hazari Sahu	428, 430
Rahim Bux v. Abdul Khader	287, 295, 300
Rahim v. Nundo Lal ..	593
Rahman v. Salamat ..	883
Rahmit v. Satgur ..	121
Rai Kishore Dasi v. Mukund Lal	617, 618
Rai Beni v. Edal ..	428
Rai Chunder v. Dinanath ..	778
Rai Kristo v. Bungshee ..	710
Rai Radha Krishna v. Bishesar	451, 664
Ragavendra v. Karuppa ..	664
Ragho Pahan v. Lachon Koer	271
Ragho Prasad v. Mewa Lal	532, 568
Ragho v. Vishnu ..	772
Raghubans v. Phool Kumari	635
Raghubans v. Sheo Sarangir	197
Raghubar Dayal v. Bank of Upper India ..	683
Raghubar v. Ilahi Baksh ..	622
Raghubar v. Kaniz Hussain	340
Raghubar v. Umed ..	292
Ragunathaswamy v. Gopal Rao	547
Raghunath Das v. Sundar Das	193, 208, 209, 398, 544
Raghunath Sahai v. Daroga Sahu	621
Raghunath v. Nathu ..	341
Raghunatha v. Venkatesa ..	7
Raj Chandra Das v. Kali Kanta Das ..	601
Raj Chunder v. Dinonath ..	769
Raj Chunder Roy v. Shama Soondari Debi	21, 825
Raj Karni v. Karm Ilahi ..	60
Raj Kishen v. Radha Madhub	507
Raj Kuar v. Chunnoo	452, 621, 625
Rajkumar v. Fateh Bahadur	869
Raj Kumar v. Raj Kumar ..	668

xlvi *THE LAW OF EXECUTION*

	Page		Page
Rajkumar Sarkel v. Rajkumari Mali ..	664	Raja Ram v. Rani Itra Kunwari ..	908
Raj Lukhee Dabca v. Gokool Chander Chowdry ..	801	Raja Ram v. Sheorani ..	363
Raj Mohun v. Gobinda Chandra ..	637	Rajarathnam v. Sheik Hasanbi ..	918
Raja v. Srinivasa ..	486, 638	Rajendro Kishore Singh v. Raghwan Singh ..	906
Raja Brajasundar v. Sivarajan ..	422, 429	R. v. Janki Prasad ..	12
Rajacharya v. Chemanna ..	478	Rajaseth v. Mt. Jankee ..	340
Rajah Enayet Hossin v. Gridharee Lal ..	715	Rajbaus Sahay v. Askaran Baid ..	427, 630
Rajagopala Ayyar v. Ramanujachariar ..	547, 647	Rajeeb Lochun v. Mohessuree Dossee ..	694
Rajah Muhesh v. Kishanund ..	197, 203, 464	Rajendra v. Nilratan ..	599
Rajah of Deo v. Abdullah ..	800	Rajendra v. Ramacharan ..	466, 472
Rajah of Kalahasti v. Maharaja of Venkatagiri ..	482, 640, 641, 805	Rajendra v. Upendra ..	433, 437
Rajah of Karvetnagar v. Venkatareddi ..	202	Rajita Ganapathy v. Bhavani-sankaran ..	787
Rajah of Raghoonundan v. Wilson ..	500	Rakal Chunder v. Dwaraka Nath ..	613
Rajah Raj Krishna Singh Bahadur v. The Collectors of Mymensingh ..	16	Rakhal Chandra v. Manoranjandas ..	486
Rajah Ramessur v. Raisham Krissen ..	424, 643	Rakhal Chandra v. Sidhinath ..	22
Raja Lakshmee v. Kathayanee ..	514	Rakha Mal v. Balwant Singh ..	130
Raja Rup Sing v. Rani Baisni ..	339	Ralo v. Damodar ..	694
Raja Saheb v. Bhudhu ..	780	Rama v. Halagua ..	340
Raja of Ramnad v. Velusami ..	787	Rama v. Shamrao ..	137, 143
Raja Wazir Singh v. Bhokhari Singh ..	628	Rama Aiyar v. Gopala Aiyar ..	172
Raja Thakur Barhma v. Jiban Ram ..	551	Ramachandar v. Puttu Lal ..	785
Raja Thakur Barham v. Ananta Ram ..	786	Ramachandra v. Gajanan ..	451
Rajani Banohu v. Kali Prasanna ..	589	Ramachandra v. Hazi Kassim ..	688
Rajani Kanta v. Lal Muhamad ..	603	Ramachandra v. Krishna ..	505
Rajanikanta v. Shaikh Rahman ..	567	Ramachandra v. Latchaman ..	856
Rajani Karth v. Ramnath ..	882	Ramachandra v. Raghunath ..	868
Raja of Bobbili v. Akella Suryanarayana ..	432, 435, 436	Ramachandra v. Rakhmabai ..	580
Raja of Kalahasti v. Raja Venkataramiah ..	456, 460	Ramachandra v. Subrao ..	468
Rajaram v. Ganesh ..	140	Ramachandra Rao v. Ramachandra Rao ..	783
Rajaram v. Musammal Umdan ..	295	Ramachari v. Duraisami ..	516
Rajaram v. Raghubans ..	293	Ramachhaibar v. Bechu ..	626
Rajaram v. Chunni Lal ..	576	Ramachunder v. Nund Lal ..	128
Raja Ram v. Itraj Kunwar ..	656	Ramabhadraraju v. Maharaja of Jeypore ..	562
		Ramadhani v. Rajrani ..	467
		Ramadhun v. Bisheswar Dayal ..	773
		Ramagirji v. Annava jjhula Venkatachalam ..	470
		Ramagopal v. Kbiali Ram ..	627
		Rama Iyyer v. Palaniappa ..	293
		Rama Iyer v. Secretary of State ..	149
		Ramakrishna v. Pushapati Vijarama ..	516
		Ramakrishnappa v. Adinarayana ..	776
		Ramalinga v. Samiappa ..	754

	Page		Page
Ram Lochan v. Ramnarain	715	Ramchandra v. Dharmo	
Ram Prasad v. Sukh Dai ..	345	Narayan ..	164
Ram Prosad v. Lakhi Narain	903	Ramchandra v. Jairam ..	712
Raman v. Chandan	535, 661	Ram Chandra v. Mudheshar	217
Raman v. Kunbayan ..	643	Ramachandra v. Rakhmabai	579
Raman v. Olagappa ..	464	Ramachandra v. Shyama-	
Ramanadan v. Rangammal	710	chandran ..	150
Ramanadan Chetti v. Alkonda		Ramachandra v. Srinivas ..	786
Pillai ..	707	Ramachandran v. Dhamodar	882
Ramanujamma v. Bothula		Ramcharan v. Kauleshar ..	883
Kamraju ..	270	Ramcharan v. Rameshwar ..	669
Ramanath v. Brindaban ..	342	Ramcharan v. Sheobarat ..	859
Ramanatha v. Somasundra	429	Ramchendra v. Rakhmabhai	580
Ramanathan v. Arunachelam		Ramchhaibar v. Bechu	566, 652
	535, 621	Ram Chunder v. Dwarkanath	34
Ramanathan v. Subramania		Ram Chunder v. Samir Gazi	509
	852, 862	Ram Chunder Poddar v. Hari	
Ramanathan v.		Das Sen ..	801
Venkatachellam ..	429	Ram Coomar v. Gobind Nath	129
Ramanayakudu v. Boya		Ram Coomar v. McQueen	409, 800
Pedda Basappa ..	219	Ram Coomar v. Shushee	
Ramanchetty v. Olagappa ..	558	Bhooshun ..	645
Ramanja v. Arunachala	503, 505	Ramdal v. Deodari Rao ..	783
Raman Naidu v. Bhassoori		Ramdas v. Mulchand ..	294
Sanyasi ..	535	Ram Das v. Official Liquidator	
Ramanujacharya v. Conjee-			623
varam Dharmarakshana		Ram Dayal v. Durga Dai ..	295
Nidhi ..	634	Ram Dayal v. Mahtub ..	12
Ramappa Chettiar v. Ekambara		Ram Dayal v. Rampal Singh	679
Padayachi ..	293	Ramdhan v. Poilasnath ..	370
Ramasami v. Bagirathi	551, 542	Ramdhani v. Rajram ..	472
Ramasami v. Karuppan ..	35	Ramdhani v. Tapi ..	639
Ramasami v. Ma U Tha ..	430	Ramdhari v. Deonandan	626, 656
Ramasami v. Murugesu ..	711	Ramdhun Rukhit v. Punched-	
Ramasami v. Ramasami	368,	nun Chuckerbutty ..	3
	551, 568, 785	Ram Dial v. Mahtab Singh	489
Ramasami v. Rangamannar	790	Ram Dial v. Narpal Singh	87
Ramaswami v. R. G. Orr ..	867	Ram Doyal v. Ram Tanu ..	718
Rama Shankar Prasad v.		Ram Dullari v. Balakram ..	706
Ghulam Hussain ..	408	Ramendra v. Hikait ..	468
Ram Ashray v. Sheonandan	518	Ramendra Path v. Mt. Hikait	
Ramaswami Chettiar v.		Kuer	466, 472
Malappa Reddiar ..	339	Rameshwar v. Hitendra ..	753
Ramaswami Chetty v.		Rameswar v. Peshwar ..	796
Alagiri Chetty ..	336	Rameswar v. Ramtanu ..	219
O. R. M. Ramaswamy Chetty		Ramaraja v. Arunachela ..	505
v. Ma U Tha ..	552	Rameshwar v. Sureshwar ..	588
Ramaswami Iyer v. Rama		Ramessuree Dassee v. Doorga	
Iyer ..	858	Dass	542, 552
Ramathai Vadivelu Mudaliar		Ramessur v. Gollamee ..	128
v. Peria Manicka Mudaliar	777	Ramessur v. Majeda ..	666
Ramayya v. Krishnachariar	233	Ram Ghulam v. Durga Prasad	
Ram Baksh v. Mughland ..	124		519
Rambutty v. Ramessur ..	366	Ram Ghulam v. Soco Deonarain	
Ram Chand v. Pittammal	239,		602
	550, 662	Ram Gopal v. Rajan Sadagar	
			536

	Page		Page
Ramhari Lal v. Nathu Ram	527	Ramraj v. Rabi Prasad	587
Ramidimarri Ganamma v. Kotireddi	191	Ram Ranjan v. Indra Nrain	22
Ramjan v. Chunder Mohan	887	Ram Ratan v. Ratin Lal	712
Ramjas Agarwala v. Gurucharan	17	Ram Rattan v. Datar Kuar.	380
Ramjas Das v. Mohan Lal	771	Ram Ruttun v. Land Mortgage Bank	232, 233
Ramjash v. Gurucharan	264	Ramsami v. R. G. Orr	867
Ram Jhati v. Kasinath	724	Ramasami v. Srinivasa	119
Ramji v. Koman	375	Ramasami Aiyar v. Venkappa	771
Ramji v. Saligram	362	Ram Saran v. Chattar Singh	26
Ramji Das v. Lala Chagal Lal	485	Ram Saroop v. Dalpat Rai	678
Ramji Lal v. Ram Prasad	828	Ram Sarup v. Bharat	806
Ramji Patel v. Karkaji	619	Ram Sarup v. Kishen Lal	128
Ram Kanai Pal v. Purna Chundra	191	Ram Singh v. Saligram	601
Rama Kant v. Kali Joy	142	Ram Sivendra v. Awadh Bihary	587
Ram Kanth v. Kalee Mohan	666	Ramsona Chowdhurani v. Sonamala Chowdhurani	649
Ram Khelvan v. Asgar Ali	571, 777	Ram Soondur v. Shoshe Mobun	644
Ramkhelawan Singh v. Sunder Raut	212	Ram Sukh v. Ram Sahai	484
Ram Kinkar v. Sithiti Ram Panja.	655	Ram Sumran v. Baburam	16
Ram Kinkar v. Sthithiram	542	Ramswarup v. Raghunandan	517
Ram Kirpal v. Rup Kuari	783	Ramtaran v. Rameswar	516, 667
Ram Krishna v. Emp.	889	Ram Taruck v. Dilwar Ali	490, 539, 663
Ramkrishna v. Surfunnissa	220	Ram Tuhul v. Bisewar Lal	603
Ram Kumar v. Ramgour	677	Ramu Aiyar v. Palaniappa Chetty	290, 294, 295, 306
Ram Kurup v. Sridevi	774	Ramudu Chetty v. Varadaraja	785
Ramlagan v. Bhawani	490	Ramzan v. Ram Daiya	710
Ram Lall v. Bama Sundari	665	Randall v. Lithgow	107, 281, 286
Ram Mal v. Mussammatt Mirun	710	Ranee Annapurni v. Swaminatha	370
Ram Narain v. Bandi Pershad	718	Rangammal v. Sevugan Chetty	289, 292
Ram Narain v. Dvaraka Nath	645, 646, 675	Rangasami v. Periasami	197
Ram Narain v. Kurun	822	Rangasamy v. Komarammal	718
Ram Narain v. Mina Koery	263, 416, 525	Rangaswami Iyengar v. Rangaswami Iyengar	883
Ram Narain v. Ram Chunder	613	Rangayya v. Parthasarathy	718
Ramnath v. Brahmamoyi	718	Rangiah Chetty v. Vajra-velu	411
Ramnath v. Murlidar	597	Rangi Ram v. Gangu	221
Ram Niranjan v. Khanu Rai	332	Rang Lal v. Kali Shankar	604
Ram Partab v. Madho Rai	249	Rang Lal v. Ravaneshwar	457, 458, 628
Rampirit v. Thakur	518	Rango v. Balkrishna	187
Ram Prasad v. Ram Charan	481, 670	Rani v. Ajudhia	123, 139
Ram Prasad v. Salik Ram	604	Rani Debendra Bala v. Babu Chandrasekhar	372
Ram Prasad v. Sukh Dai	348	Rani Indomati v. Jageshar	331
Ram Raghubar v. Imani Begam	23	Rani Narain v. Mohonian	779
		Rani Ratan Kuar v. Rafin Lal Seth	805
		Ranjit v. Ramjatan	664, 666

11

S

	Page		Page
Sabjir v. Noordin ..	104	Saleh Mahomed v. Mohar Singh ..	380
Sachi Prasad v. Amarnath ..	26, 31	Saligram v. Narain Das ..	500
Sadagopa v. Jamuna Bai ..	507, 661	Salimullah v. Sainaddi Sarkar ..	9
Sadashiv v. Jayantibai ..	87	Salle v. Mohan Lal ..	772
Sadashiv v. Narayan ..	917	Samanta Gagarnath v. Lokenath ..	22
Sadashiv v. Trimbak ..	518	Sambandan v. Aketh Mayan ..	654
Sadasheo Tamboli v. Mt. Kaireman ..	805	Sambasiva v. Seethalakshmi ..	606
Sadasiv v. Atmaram ..	343	Sambasiva v. Vydinada ..	467, 469
Sadasiv v. Jayantibai ..	140	Sambhunath v. Golap Singh ..	705
Sadatmand v. Phul Kuar ..	617	Sami v. Krishnasami ..	417, 620
Sadaya Pillai v. Amurthathachy ..	307, 315, 326	Sami Mudaliar v. Muthian Chetty ..	515
Sadayappa v. Ponnamma ..	213	Samipillai v. Krishnasami ..	622
Saddo Kunwar v. Bansidhar ..	501	Samiruddin v. Abdul Syed ..	628
Sadek Ali v. Samed Ali ..	252	Sampson v. Saet & Co., Ry. Co., ..	282
Sadho v. Abhenandan ..	378, 393	San Bwin v. Nagamuthu ..	725
Sadho Saran v. Hawal Pande ..	39	Sandhu v. Hussain ..	914, 917
Sadhu v. Huisain ..	912	Sangam Ram v. Sheobart Bhagat ..	489, 536
Sadhusaran v. Panchdeo ..	490	Sankaralinga v. Kandasami ..	210, 399
Sadu v. Ram ..	338	Sankar Sarup v. Mejo Mal ..	868, 888
Safdar Ali v. Fazal ..	554, 620	Sanktha Prasad v. Raja Krishna Dat ..	394
Safar Ali v. Raj Mohan ..	578	Sankunni v. Narayanan ..	772
Sabadu v. Devlya ..	556, 665	Santa v. Battersby ..	155
Sahdeo v. Ghasiram ..	542, 544	Sant Bux v. Nadir Mirza ..	424, 427
Sahib Dyal v. Lajpat Rai ..	348	Santhoyi Ammal v. M. K. Mahomed ..	124
Sahibunnisa v. Abdul Gaffur ..	444	Sant Lal v. Ramji Das ..	644, 645
Sahibunnissa v. Hafiza ..	148	Sant Lal v. Umraounnisa ..	520, 535
Sah Man v. Kanagasabapathi ..	211	Santosh Bala Debi v. Ramchandra ..	487
Sahoo Chund v. Geetum Singh ..	219	Sant Ram v. Ramchand ..	363, 369
Saifuddin v. Hansraj ..	568	Santu v. Abhai Nandan ..	520
Sailabala Debi v. Nriya Gopal Sen ..	617	San Tun Pru v. Mi Ani Me ..	292
Sailgram Pateria v. Murlidhar Pateria ..	557	Sanwal Das v. Bismillah ..	272
Sain Ditta v. Nur Ahmed ..	380	Sanwal Singh v. Prag Dutt ..	507, 629
Sait Siva Pratapa v. A.E.I. Mission ..	855	Sanwul v. Makhun ..	629
Saiyud Raziuddin v. Bindesri Prasad ..	299	Sarabji v. Kala Ragunath ..	551
Sajan Ram v. Ram Rattan ..	298	Sarabjit v. Rai Kumar ..	883
Sakarlal v. Bai Parvati ..	30	Sarada Kripa Lal v. Harendra Lal ..	584
Sakharam v. Gadya ..	292	Sarada Prasad v. Lachmeput ..	71
Sakharam v. Damodar ..	648, 655	Saradindu v. Gosta Behari ..	451, 453, 454, 777
Sakhawat v. Muhamud ..	714	Sarala Subba Rau v. Kam-sala Timmayya ..	298
Sakhi v. Kalanand ..	429, 617		
Sakhi Rai v. Ram Autar ..	627, 651		
Sakina Bai v. Kaniz Fatima Begum ..	146		
Salakshi v. Lakshmayee ..	143		
Salamat v. Lukhi Ram ..	168		
Salanas v. Ali Akbar ..	889		

TABLE OF CASES CITED

liii

	Page		Page
Sarala Sundari v. Sarada Prasad ..	171	Sati Prasad v. Jogesh Chunder ..	713
Sarash Prasad v. Peoples Industrial Bank ..	16, 524	Satischandra v. Rameswari Dasi ..	572
Saraswati v. Nabadwip ..	128	Satish Chunder v. Thomas ..	628, 629
Saraswatibai v. Yadorao ..	340	Satish Chandra v. Nishi Chandra ..	653, 655
Saratchandra v. Apurvashara ..	373	Satish Chandra v. Porter ..	447
Sarat Chandra v. Doyal Chand ..	861	Satish Chandra v. Purna Chandra ..	9
Saratchandara v. Tarini Prasad ..	298	Satish Ranjan v. Mercantile ..	22
Sarat Chunder v. Gopal-Chunder ..	799, 800	Satkari Mandal v. Tirtha Narain ..	287, 292
Saratchandra v. Motilal ..	577, 578	Sattappa v. Jogi Soorappa ..	7
Sarba Sundari Dasi v. Harendra Lal Roy Chowdhury ..	271	Satya Bhushan v. Krishna Kali ..	603
Sarbi Begam v. Hider Shah ..	587	Satya Charan v. Madhub Chunder ..	219, 220
Sardar v. Mehrechand ..	353	Satya Narayana v. Narayana-swami ..	197
Sardar Dial v. Beliram ..	339, 344	Satyendranath v. Nilkantha ..	410
Sardarkara v. Abdullah ..	889	Saudamini v. Krishna Kishor ..	694
Sardarmal v. Aranvayal Sabapathy ..	711	Savage v. Bentley ..	874
Sardarni v. Ram Rattan ..	380	Savage v. Norton ..	878
Sardhari Lal v. Ambika Prashad ..	287, 293, 300, 307, 332	Savile v. S. ..	471
Sariatolla v. Ra Kumar Roy ..	912	Savile v. Sale ..	483
Sarjoo Prasad v. Nanoo Roy ..	588, 589	Sawan v. Jafar ..	587
Sarju v. District Judge of Benares ..	234	Sawan v. Maya ..	470
Sarju Prasad v. Bindeshari ..	785	Sawan Mal v. Shib Dayal ..	491
Sarju Prasad v. Mukanphan ..	208, 213	Sayadkhan v. Davies ..	152, 187
Sarkias v. Bundho ..	661	Sayed Amin v. Sheikh Masleudding ..	518
Saroda Charan v. Kista Mohun ..	16	S.B. Das v. Muthia Chetty ..	91, 710
Saroda Prosad v. LuchmEEPuT ..	563	Scorell v. Boxall ..	100
Sarooj Prasad v. Nanoo Rai ..	708	Scott v. Scholey ..	94
Sartaj Kuari v. Deoraj Kuari ..	587	Seaton v. Deerhurst ..	818
Sarvei Begam v. Haidar Shah ..	589, 599	Secretary of State v. Abdul Hakkim ..	147
Sarvi Begam v. Ramachandes ..	770	Secretary of State v. Khemchand ..	146, 148, 149
Sashi Churn v. Annapurna ..	916	Secretary of State v. Raj Kumar Mukherjee ..	160
Sasi Bhusan v. Radhanath ..	240, 417, 551, 628	Seetharama v. Krishnarow ..	196, 197, 199
Sasirama Kumari v. Meherban ..	779	Seetharamasami v. Syed Mir ..	585
Satapa v. Kaabasapa ..	566	Seikh v. Beraj Mohini ..	594
Satdhar v. Ramachandra ..	382	Semayne v. Gresham ..	54
Satgur Prasad v. Raj Kishore Lal ..	683	Seru Mohan v. Bhagwan ..	916
Satinath v. Ratnamani ..	350	Seshagiri v. Salvador ..	712
Satindranath v. Siva Prasad ..		Seshagiri Rao v. Sreenivasa Rao ..	655
		Seshagirirao v. Tangaturi ..	661
		Seshagiri Rao v. Jagannatham ..	516

	Page		Page
Sesha v. Krishna ..	450	Shankar Dial v. Amir ..	265
Seshagiri v. Jagannadham	666	Shankar Sat v. G. Harman	
Seshagiri Rao v. Srinivasa Rao ..	653	& Co., ..	265
Seshagiri v. Salvador ..	806	Shanker Rao v. Manik Rao.	
Sethai Gounden v. Subramania	619, 629	40, 194 551, 628	
Seth Ballabhdas v. Subba Singh ..	593	Shankar Viswanath v. Umabai ..	116
Seth Chand v. Durga Dei ..	266	Shanker v. Ram Kishen ..	240
Seth Jaidayal v. Ram Sahae	392	Shankurdas v. Basant Singh ..	147
Seth Mannalal v. Gainsford	159, 160	Sha Nagindas v. Halalkore ..	503
Seth Oodey v. Chaitram ..	694	Shantappa v. Subrao ..	503
Set Umedmal v. Srinath	571, 650	Shantmurthi v. Narayana ..	379
Sevugan Chetti v. Rangam-mal ..	290	Shanto Chandar v. Nain Sukh	411, 645 719
Sewa Ram v. Dhera Shah	118	Sharfu v. Mir Khan ..	908
Sew Bux v. Shib Chunder	151	Sharfuddin v. Hansraj ..	661
Sewdat Roy v. Sree Canto Maity	241, 849	Sharoda Moyee v. Wooma Moyee	175, 551, 628
Shadgett v. Clipson ..	46	Sharoda Prasad v. Luchim-put Singh ..	508
Shadi v. Anup ..	364	Shashibhushan v. Charushila	589
Shafat v. Hurmat	785, 790	Shashi Bhushan v. Hari Narain ..	164
Shafdar v. Fazal ..	620	Shaw v. Shaw ..	107
Shafion v. Mamidullah ..	135	Sheetanath v. Madhub ..	775
Shahabooden v. Ram Gutty	694	Sheikh Abdul Ghafar v. Raghubar Singh ..	532
Shah Fareed v. Sheo Charun	462	Sheik Budan v. Ramachandra ..	788
Shah Mohammed v. Lachminarain ..	118	Sheikh Bux v. Raghubar Ganjhu ..	626
Shahzadi v. Ahmad Ali	438, 558	Sheikm Golam v. Mt. Shama Sundari	198, 203
Shaik Abdulla v. Haji Abdulla ..	712	Sheik v. Kanje ..	440
Shaik Davud v. Paramasami	41	Sheik Mahomed v. Bhagwati Prasad	221, 392
Shaikh Sajjad v. Sakai Rai	518	Sheikh v. Mathura ..	578
Sha Karam Chand v. Ghela Chari ..	15	Sheikh Muhammad v. Subba Naicker ..	590
Shakrukh v. Sheo Prasad ..	137	Sheikh Mula v. Raghubar ..	636
Shama Churn v. Madhub Chandra ..	888	Sheikh Nasur v. Emp. ..	13
Shambhu Mahto v. Midnapur Zamiudari Co. ..	521	Shekambas v. Ram Kumar	667
Sham Coomar v. Juttun Bibee ..	710	Shekh Adam v. Jannadas	341
Sham Lal v. Nilani ..	661	Shenbagamuthu v. Vaduganatham ..	468
Sham Lal v. Roshan Lal ..	429	Sheodeni v. Ram Saran ..	555
Shamshamal v. Bhausali ..	108	Sheodhyan v. Bholanath ..	550
Shamsonnessa v. Anne Love	57	627, 662	
Sham Sundar v. Achan Kunwar ..	164	Sheo Gobind v. Dhanukdhari	615, 645
Samsudin v. Shaikh Amir ..	127	Sheo Indur Bahur Singh v. Ghazi-ud-din ..	725
Shamsuddin v. Abdul	164, 165	Sheo Mangul v. Mt. Halsu	796
Sham Sundar v. Jhumat	544, 621, 628	Sheo Narain v. Ram Jatan	557
Shankar Daji v Dattatraya Vinayak	546	Sheonath v. Jauki Prasad ..	448, 449

TABLE OF CASES CITED

lv

	Page		Page
Sheo Prasad v. Hira Lal ..	541,	Shivlingappa v. Chanba-	
	551, 613, 616, 622	sappa ..	214
Sheo Prasad v. Mossamat		Shiv Prasad v. Santooji ..	618
Prema ..	636	Shivram v. Ravji ..	503, 507
Sheo Prasad v. Mubammad	378	Shoilaga Nand v. Peary	
Sheo Prasad v. Prema Kuar	636	Churn ..	166
Sheo Progash v. Bhoop		Short v. Pickering ..	358
Narain ..	12	Shortland v. Govett ..	15
Sheo Prokash v. Hurdai ..	629	Shoshee Mukhee v. Dwara-	
Sheoraj v. Kameshwar	708, 786,	kanath ..	619
	799	Shosi Bhusan v. Ahmed ..	628
Sheoraj v. Kamestiar ..	786	Shri Bhavani Devi v. Devray	
Sheoraj Nandan v. Gopal ..	288	Madhavrao ..	38
Sheoram v. Lalman ..	123	Shridhar v. Babaji ..	715
Sheoram v. Thakur Prasad	52	Shrikisan v. Gadadher ..	718
Sheoratan v. Chotey Lal ..	715	Shri Krishna v. Ramsaran	636,
Sheorutton v. Net Lal	539, 632,		640
	663	Shringarpura v. Pethe ..	712
Sheo Sahai v. Najaf Khan	790	Shriniwas v. Jagadevappa ..	373
Sher Khan v. Misrilal	623, 630,	Shripat Narain v. Tirbini	
	639	Misra ..	515
Shersingh v. Dayaram ..	640	Shujat Ali v. Ajudhia	
Sher Singh v. Sri Ram	130, 169	Prasad ..	786
Shew Narain v. A. B. Miller	197	Shumbhoonath v. Luchy-	
Shiam v. Bashiruddin ..	576	nath ..	861
Shiam Behari v. Rup		Shumsoonnissa Begum v.	
Kishore	278, 489, 490	Mirtunjoy Bose ..	35
Shiam Lal v. Koerpai ..	524	Shundi Bibi v. Mebarak Ali	613
Shiam Lal v. Nathe Lal	508, 309	Shunmugam v. Moidin ..	362
Shib v. Thika ..	441	Shurutoollah v. Gooroo-	
Shibdas v. Bulaki Mal ..	867	churn ..	523
Shibdas v. Kalikumar ..	555	Shyam v. Sundar ..	456
Shibdas v. Ramanath ..	203	Shyamchand v. Mortgage	
Shib Kunwar Singh v. Sheo		Bank of India ..	137
Prasad Singh ..	351	Shyam Karan v. The	
Shib Lal v. Azmatulla ..	130	Collector of Benares	393, 394
Shib Lal v. Peare Lal ..	790	Shyam Mandal v. Satinath	542,
Shib Narain v. Baikunthath	299		546
Shib Narain v. Gobind ..	623	Shyam Prosonno Katari v.	
Shiboo Narain v. Mudden		Keshab Chandra ..	61
Ally	337, 338, 352	Sibdial v. Gouree Rao ..	801
Shib Prokash v. Sardar		Sidh Gopal v. Hari Lal ..	707
Doyal	424, 619	Siddheswari v. Goshain ..	677
Shib Singh v. Sitaram ..	208	Siddheshwari Prasad v.	
Shiek Budan v. Rama-		Mayanand ..	679
chandra ..	785	Sidlingappa v. Shankar-	
Shippy v. Grey ..	206	appa	171, 190
Shirin v. Agha Ali	491, 632, 652	Silam Kalia v. Silam Sitama	518
Shirley v. Watts ..	356	Simpson v. Hartoopp ..	180
Shiv Prasad v. Santeji ..	615	Simrik Lal v. Radharaman	219
Shivabai v. Yesoo	571, 955	Sind Bank Lt. v. Amersi	
Shival v. Shambhu Prasad	571	Dyal ..	645
Shivappa v. Dod Nagaya ..	309,	Singai Parmanand v. Baji	
	310, 311, 316	Rao ..	168
Shivaram v. Raoji ..	507	Singariah Chetty v.	
Shiv Dayal Ram v. Mahomed		Chinnabhi ..	295
Khan ..	61		

	Page		Page
Singer Manufacturing Co.		Sonba v. Ganesha	.. 392
Lt. v. Govind	.. 100	Sonu v. Behari	555, 557
Singer Manufacturing Co. v.		Soobul v. Russick	.. 208
Niaz Ali	.. 100	Sookan v. Lal Badrinarain	.. 661
Sinnappan v. Arunachalam	219, 243, 535	Sookoomar v. Kashee	.. 487
Storey v. Robinson	.. 182	Soonder v. Mr. Buhooria	.. 197
Sinnu Pandaram v.		Soono Modi v. Latkari	.. 271
Santhoji	.. 525	Soorj Buksh v. Sreekishen	.. 472, 478
Sirajunnissa v. Jan		Soper v. Arnold	.. 434
Muhamed	.. 505	Sorabji v. Govind	225, 226, 230, 450, 611, 853
Siraminatha v. Sivaguru-		Sorabji v. Kala Raghunath	491, 852
natha	.. 808	Soudamini Dasi v. Behari Lal	34
Sital Pershad v. Luchmi		Sowcar Komurudeen v. Noor	
Persad	.. 142	Mohamad	.. 770
Sitama v. Narayana	.. 796	Sparks v. Young	.. 108
Sita Nath v. Hari Krishna	636	Spence v. Coleman	.. 118
Sitanath v. Sani Kunak	.. 790	Sree Krishna Doss v. H. Chan-	
Sitaram v. Amir	.. 781	dook Chand	.. 451
Sita Ram v. Janaki Ram	.. 472	Sreekunt Dass v. Ramjeebun	620
Sitaram v. Subheda Kuar	.. 660	Sreematy Asaban v. Ananda	
Situra Begam v. Muhamad		Chandra	.. 658
Ishaq	.. 770	Sreemutty v. Sheebanee	.. 666
Sit Pi v. Ma San	.. 213	Sree Pershad v. Shuroopa	.. 694
Sit Pwan v. Ngwe Thain	.. 554	Sreeputhy v. Kartick	277, 336
Sivadurga Debi v. Rajmohan	617	Sri Chund v. Murarilal	.. 209
Sivagnanthamal v. Aruna-		Sridhar v. Jageshwar	.. 916
Chalam	.. 363	Sri Keena v. Haji Mahomed	853
Sivagami v. Subramanya	.. 429	Srihury v. Murari	785, 791
Sivakolundu v. Gana-		Sri Krishnasami Aiyangar v.	
pathi	17, 20, 629	Soorikutti Ganapati Iyer	516
Sivarama v. Veerappa	.. 32	Sri Lal v. Ballah Shankar	.. 234
Sivaraman v. Maung Po	.. 348	Sri Maharani Beni Prasad v.	
Sivaswami v. Sulaiman	.. 246	Lokhi Rai	.. 650
Sobhagchand v. Bhaichand	505, 694, 715	Srimati v. Beni Madhab	.. 364
Slater v. Pinder	.. 209	Srimathi Anandamoyi v.	
Smith v. Allahabad Bank	.. 89	Dhanendra	.. 800
Smith v. Cowel	.. 369	Srimati Sarat Kumari v.	
Smith v. Hurst	.. 356	Nimaichuran	452, 625
Sobhanadri Apparao v.		Srinath v. Kanhaiylal	.. 139
Govindharaju	.. 571	Srimunto Hajrah v. Tajooden	.. 300
Sobran v. Sibilas	.. 785	Srinath Dutt v. Gopal Chundra	.. 620
Sohan Lal v. Jot Singh	.. 717	Srinivasa v. Appavoo	.. 527
Sohun Lall v. Gya Pershad	779	Srinivasa v. Ayyathorai	.. 578, 580, 601
Soman Koeri v. Ram		Srinivasa v. Kanthimathi	.. 863
Kinker	.. 705	Srinivasa v. Keshoprasad	.. 374
Somasundaram v. Alagappa	262	Srinivasa v. Malayacha	.. 467
Somasundaram v. Chokka-		Srinivasa Aiyangar v. Douglas	.. 100
lingha	.. 796	Srinivasa Aiyangar v. Kundasami	.. 22
Somasundaram v. Muthu-			
veerappa	.. 20, 248		
Somasundaram v. Sunde-			
rash	.. 866, 868		
Sonaram Dass v. Mohiram			
Dass	411, 696		

	Page		Page
Srinivasa v. Sami Rau ..	197	Subramania v. Siva Subra-	
Srinivasa v. Seetharama ..	853	manyas ..	667
Srinivasa v. Sesha ..	503, 506	Subramania v. Subba ..	118
Srinivasa v. Vellayan ..	909	Subramaniam v. Sankara ..	849
Srinivas v. Radhabai ..	450	Subramania v. Secretary of State ..	147
Sripal Singh v. Gouri Shankar ..	557	Subramaniam v. Arunachalam ..	105
Sripaticharan v. Belchambers ..	11	Subramaniam v. Gopalarama ..	777
Sri Rammanik v. Tincowri Rai ..	243	Subramanian Pattar v. Kirada-	
Srish Chandra v. Sadhu Charan ..	629, 637	dasan ..	413
S. R. R. M. C. T. Chetty v. Bowsinga ..	16	Subramanian v. Raja of Ramnad ..	855
Stanhope, Silkstone Collieries, Co. Re ..	209	Subramanian v. Ramaswami ..	867
Steel v. Alan ..	60	Subraya v. Velayuda ..	148
Stein v. Valkenhuysen ..	46	Subraya Devy v. Venkatarama ..	821, 822
Stemming Re ..	112	Subraya Mudali v. Velayudha Chetty ..	149
Storey v. Robinson ..	180	Suchand v. Balaram ..	577, 606
Stowell v. Ajudhia ..	262, 552	Sudhir Chandra v. Govinda Chandra ..	519
Stumore v. Campbell ..	113, 282	Sudarsandas v. Ram Prasad ..	299
Subba v. Ponnambala ..	679	Suhuj Narain v. Ram Pershad ..	233
Subba Bibi v. Hari Lal ..	779	Sukhai v. Daryai ..	490
Subbachariar v. Muthuveeran Pillai ..	198	Suja Hossein v. Monohur ..	122
Subba Goundan v. Krishnama Chari ..	706	Sujauddin v. Reajuddin ..	486, 638
Subba Iyer v. Subba Iyer ..	299	Sujjeervan v. Gopal ..	162
Subbarama v. Nagammal ..	787, 790	Sukhai v. Laryai ..	657, 671
Subbaraya v. Muthammal ..	640, 785	Sukhdeo v. Sheo Ghulam ..	377, 520
Subbaraya Mudaliar v. Kandasamy ..	337	Sukhi Ram v. Ramautar Rai ..	652
Subbarayudu v. Kotayya ..	444, 449, 659	Sukhraj v. Debi Buksh ..	427
Subbarayudu v. Lakshminarasamma ..	585	Sulemanji v. Pragji ..	612
Subbarayudu v. Pedda Subbaraju ..	613	Sultan v. Gulzari ..	190
Subbayya v. Krishna ..	167	Sumitra Kuer v. Damri Lal ..	634
Subbayya v. Venkataratnam ..	326	Sunboff v. Alford ..	180, 182
Subayya v. Yellamma ..	570	Sundar v. Ghasi ..	351
Subbiah v. Muthukumarasamia ..	527	Sundara Gopalan v. Venkataravada ..	411, 642, 696, 800
Subbiah v. Ramanathan ..	784	Sundaram v. Mausaravanthar ..	580, 585, 602
Subbier v. Moideen Pichai ..	297	Sundaram v. Sankara ..	367
Subed Ali v. Emp., ..	12	Sundarappaiyar v. Arunachalla Chettiar ..	644
Subramania v. Appu ..	197	Sundar Mt. v. Babu Lal ..	340
Subramania v. Chokkalinga ..	175, 220	Sundar Bibi v. Rajinder Narain ..	168
Subramania v. King Emperor ..	567	Sunkari Sitayya v. Mudarajaddi Sanaysi ..	213
Subramania Aiyar v. Rajeshwara ..	796	Suppa Reddiar v. Avudaimmal ..	203
		Superior Bank Ltd., v. Budh Singh ..	629
		Suraj v. Govinda ..	694

	Page		Page
Suraj Bunsî v. Sheo Pershad	243, 705	Syud v. Rughoonath ..	107
Suraja Kumar v. Promoda Sundari	22, 860	Syud Nawab Ali v. Sheikh Uzir	.. 416
Suraj Deo v. Sarjug Prasad	518		
Surajman v. Charan	.. 453	T	
Suraj Narain v. Hardwar Singh	.. 626	Taffazul v. Raghunath	.. 137
Suraj Narain v. Ratanlal	.. 773	Tailby v. Official Receiver	.. 165
Suraj Narayan v. Janholi	.. 705	Taimuddi v. Lakpat	.. 629
Surangini Deby v. Kedarnath	132	Taj Singh v. Jagan Lal	.. 791
Suraparaju v. Narasimham	241	Tallapragada Sundrappa v. Boorugapalli Sriramulu	.. 668
Surendra v. Hurruck	.. 427	Tammapan v. Narasingh	.. 705
Surendra Mohini v. Amararesh Chandra	.. 634	Tancred v. Allgood	.. 817
Surendranath v. Bansî Badan	220, 249	Tanji Dagade v. Shanker	.. 776
Surendranath v. Bolaram	.. 8, 536, 547, 790	Tanjore Palace Estate v. Thiyagaraja	209, 717
Surendranath v. Kiran	337, 341	Tanguturi Jagannadhan v. Seshagiri	.. 658
Surendranath v. Mritunjay	.. 429	Tapesri Lal v. Deokinandan	474, 378
Surendranath v. Shyama Charan	.. 264	Taponidi v. Mathura	.. 450
Surendranath v. Bangsi Badan	.. 220, 632	Tapp v. Jones	.. 105
Surendra Kristo v. Gur Prasad	.. 576		108, 282
Sur Jan Singh v. Pragdas	.. 858	Tarachand v. Abdul Ahad	.. 661
Surnomoyee v. Dakhina Ranjan	.. 620	Tara Chand v. Raj Kishore	272
Surnamoyi v. Ashutosh	295, 334	Tarachand v. Ramnath	.. 522
Suryanarayanarao v. Balasubramania	.. 710	Taranath v. Joy Soonduree	684
Suryanarayana v. Gopala	.. 860	Tarakohandra v. Baikant-nath	..
Suryanarayana v. Hari Mohan	.. 882	Taraknath v. Shyamacharan	551
Swaminatha v. Dharmalinga	.. 800		627, 628
Swaminatha v. Mrs. R. D. Paul	.. 602	Tara Prasad v. Nund Kishore	.. 506
Swaminatha v. Sivagurunatha	.. 629	Tara Sundara v. Sordda Charan	167
Syamal Mandal v. Nilmay Das	.. 669	Taravadi v. Bai Kashi	.. 118
Syed Ali v. Adib	.. 822	Tarini Prosad v. Deva Prasanna	.. 614
Syed Asad v. Wahidunessa	368	Tarsi Ram v. Man Singh	.. 786
Syed Md. Shakir v. Jugalkishore	.. 52f	Tarubala v. Mani Lal	.. 625
Syed Muhammed v. Mt. Wazir Bibi	194, 212	Tarvadi v. Bai Kashi	119, 577
Syed Ruznuddeen v. Mt. Fuzalin	.. 828	Tasadduk v. Ahmad	551, 618
Syed Taffazal v. Raghunath	.. 149		620, 628, 652
Syed Wajed v. Hafiz Ahmed	444	Tasaduk v. Asgar	.. 887
Syud v. Kalee Kumar	.. 440	Tasuduk v. Muksud	.. 441
		Tayabali v. Atmaram	.. 295
			297
		Taysingh v. Jagan Lal	.. 788
		Tejpal v. Tarasingh	914, 916
		Tej Singh v. Banwari Lal	.. 133
		Tej Singh v. Govind	.. 441
		Tejram v. Kusaji	107, 150
		Tekait Krishna Prasad v. Moti Chand	521, 628, 637

TABLE OF CASES CITED

lix

	Page
Thairaviam Pillai v. Lakshmana Pillai ..	855
Thakcor Mahatab v. Ledlannund ..	643, 647
Thakur v. Gurdit ..	789
Thakur Birmha v. Jiban Ram Marwari ..	533
Thakurdas v. Gangaram ..	718
Thakurdas v. Joseph ..	953
Thakur Ganeshi Singh v. Shyam Singh ..	915
Thakurdas Motilal v. Joseph Iskendar ..	402
Thakur Jai Inder v. Thakur Bachun ..	771
Thakur Mahton v. Jhaman Mahton ..	689, 590
Thakur Tajeswari Dutt v. Lakshman Prasad ..	519
Thangi Shettithi v. Duja Shetti ..	784
Thathu v. Kondu ..	454, 455
Thekkedath Neelu v. Subramania ..	431
Thenju v. Chimmu ..	663
Theyyavelan v. Kochan ..	769
Thimmaraju Venkata Kutumbarae v. Venkatappa ..	584
Thiruvengadiah v. Thiruvengadiah ..	399
Thirviyan v. Lakshmana ..	234, 399
Thoda v. Degumburee ..	716
Thomson, <i>In re</i> ..	64
Thornton v. Fiuch ..	396
Tikati Dal v. Christian ..	639
Tikati Damodar v. Ganga Ram ..	365
Tilesbar v. Parvati ..	786
Timmana v. Mahabala ..	616
Timmana v. Putobhata ..	807
Timmappa v. Lakshmana ..	728
Timmappa v. Narsimha ..	705
Tincouri v. Shib Chandra ..	551
Tinnappa v. Murugappa ..	807
Tipangavda v. Ram Gavada ..	586
Tirthasami v. Annappayya ..	785
Tirumalaisami v. Subramanian ..	677, 679, 683
Thirumala v. Pingala ..	781
Tirumalrao v. Syed Dastagir ..	576, 593
Tiruvengadiah v. Thiruvengadiah ..	373
Tiruvengada v. Vythilinga ..	190
Tittu Gopalachariar v. Mayappa Chetty ..	515

	Page
Tokai Sherob v. Davod Mullick ..	711
Tolhurst v. Associated Portland Cement Manufacturers, Ltd. ..	141
Toola Ram v. Abdul Gafoor ..	868
Toolsa Goolal v. Bombay Tramway Company Ltd ..	284
Toolste v. Antone ..	366
Totaram v. Chain Sukh ..	566
Tota Ram v. Chhoturam ..	595
Totomal v. Raising ..	219
Trimbak v. Nana ..	610, 623
Trimbak v. Pandurang ..	707
Trimbak v. Ramachandra ..	593
Tripoora Soonduree v. Ijia-toonnuissa ..	300
Tripurasundari v. Durga Churn ..	629
Troylukhonath v. Palharam ..	25
Taifuzzool v. Raghoonath ..	105, 106, 165, 166, 275
Tuffuzul v. Lee ..	105
Tukaram v. Deoji ..	462
Tukaram v. Ramachandra ..	676
Tukran v. Gunaji ..	805
Tulaji v. Balabhai ..	131
Tuljaram Rao v. Ramchandra Rao ..	259
Tulasi v. Balabhai ..	577, 110
Tulsa Kunwar v. Jogeshwar Prasad ..	373
Tulsigiriappa v. Fakirayya ..	331, 603
Tulsi Ram v. Izzat Ali ..	473
Turmuklal v. Kaliyandas ..	580
Tyaballi v. Atmaram ..	261, 263
Tyrell v. Panton ..	271
	281, 282
	129, 366

U

Uda v. Mulchand ..	520
Uda Begum v. Imamuddin ..	409
Udham Singh v. Gurdip Singh ..	518
Udoy Kumari v. Hari Ram ..	169
Ugrah v. Radha Prasad ..	591
Umabai v. Amirtrao ..	373
Uma Churn v. Gobind Chunder ..	685

	Page		Page
Umade Rajaha v. Ranga Bhupala ..	396	Vadapalli Narasimhan v. Dronamraju Seetharamamurthy ..	311
Umadi Rajaha v. Sri Raja Velugoti ..	617	Vaduganathan v. Fox ..	456, 618
Uma Kanta Roy v. Dinno-nath ..	486	Vaguram v. Rangayyengar ..	143, 145, 171
Umakanta Sen v. Hiralal Roy ..	394	Vaidhinadaswami v. Soma-sundaran ..	190, 860
Uman Chunder v. Indro Narain ..	658	Vaidyanatha v. Eggia ..	169
Umashashi v. Akrur Chandra ..	770	Valaet Ali v. Matadeen ..	832
Umbica Churn v. A. C. Meik ..	366	Valiakath Puthiah v. Thachar ..	197
Umbica Churn v. Madhub Goshal ..	888	Valiakath Puthiah v. Manakkal Parameswaran ..	194, 195
Umbica Churn v. Dwarka Nath ..	635	Vallabhan v. Pangunni ..	466, 467, 472, 478
Umed v. Jai Ram ..	652	Vallabha Valia v. M. Kovilukath ..	918
Umed v. Jas Ram ..	566, 627	Valla Thamburatti v. Amijani ..	148
Umed Kika v. Nanindas ..	27	Valle v. Reilly ..	371
Umesh Chunder v. Raj Bullub ..	217, 224, 324	Vanjapuri v. Krishna Patta ..	706
Umesh Chunder v. Shib Narain ..	481	Varada Ramaswami v. Uma Venkataraman ..	867
Umesh Chandra v. Khulna Loan Co. ..	603	Varadaraja v. Murugesu ..	794
Umesh Chunder v. Zahur ..	714	Varadiah v. Rajakumara Venkataperumal ..	82, 785
Umma Venkataratnam & Co., v. Adamji Usman & Co., ..	400	Vardiparthi Ramayya v. Kosrukonda Jagannadham ..	203
Umrao Singh v. Lal Singh ..	577	Varajlal v. Kachia ..	332
Unapoorna v. Nufar ..	800	Varahaswami v. Ramachandra ..	137
Uncovenanted Service Bank v. Abdul Bari ..	779	Varanakkot Illath Subramanyam Nambudri v. Vykunda Kammathi ..	465
Union Bank of London v. Lenanton ..	93, 505	Vasireddi Sriramulu v. Lakshminarayanan ..	518
Unnamalai v. Mathan ..	515	Vasudeo v. Eknath ..	341
Unnoocol Chunder v. Hurry Nath ..	490	Vasudeo Atmaram Joshi v. Eknath Balakrishna Thite ..	329
U. Paw v. N R.M.A. Chetty ..	647	Vasudeo Atmaram v. Eknath ..	334
Upendra v. Bhupendra ..	376	Vasudeo Atmaram v. Eknath Balkrishna ..	342
Upendranath v. Bhudeb Chandra Roy ..	417	Vasudeva v. Narayana ..	191
Upendranath Sen v. Umakanta ..	89	Vasudeva v. Damodaram ..	139
Urquhart v. Nundeeput ..	620	Vasudevan v. Sankaran ..	663
Uthandi v. Raghavachari ..	142	Vasanji Haribhai v. Lallu Akhu ..	319, 800
Uttam Chand v. Dhanpat Rai ..	623, 625	Veal v. Warner ..	818
Uttam Chandra v. Khetra Nath ..	641	Vedavyasa v. Madura Hindu Sabha Nidhi ..	429
Uttam Chandra v. Rai Krishna Dalal ..	451, 557	Vedalingam Pillai v. Veerathal ..	918
Uzir Biswas v. Haradeb Das ..	136	Veeraraghava v. Mallikarjuna ..	196
V		Veeraraghavan v. Vatasseri ..	597
Vachali Rohini v. Kombi Aliassan ..	908		

TABLE OF CASES CITED

lxi

	Page		Page
Veerappa Chetty v. Ramasamy	.. 513	Venkappa v. Chenbasappa	.. 295
Veerchand v. B. B. & C. I. Ry. Co.	159, 160	Venkatarama v. Paramasiva	627
Veera v. Karuppa	.. 337	Venkatanarasiah v. Subbamma	.. 661
Velan v. Kumarasami	.. 507	Venkatasami Naidu v. Gurusami Iyer	.. 193
Velayuthan v. Lakshmana	.. 295, 323	Venkateswarayyen v. Aswatha Narayanan	.. 195
Velji Hirji v. Bharmal	.. 289	Venkatarama v. Esumsa Rowthen	.. 92
Velate Ali v. Matadeen	.. 828	Venkataratnam v. Ranga Nayakamma	.. 306
Velchand v. Bouchier	153, 155	Venniswami v. Peryaswami	588, .. 589
Velu Manikaran v. Pakarvoor Manakal	.. 26	Venugopal v. Venkata Subbaya	332, 333
Vemuri Pitchayya v. Raja Yarlagadda	.. 10	Veyindra Muthu Pillai v. Mayanadan	.. 718
Venkappa v. Chenbasappa	.. 298, 334	Vibudhapriya v. Yusuf Sahib	216, 224 851
Venkata v. Subbamma	.. 569	Vidyatheertha v. Venkatarama	.. 589
Venkata Subba Rao v. Asiatic Steam Navigation Co.	.. 25	Vigneswara v. Bapayya	.. 555
Venkata v. Chengadu	.. 513	Vinayakarav v. Devrao	905, 908
Venkata v. Sama	.. 464, 558, 619, 620, 623	Viraraghava v. Varada	450, 858
Venkatachellam v. Veerappa	26	Viraraghava v. Venkata	455, 648
Venkatachelapati v. Virasami	299	Virjibulu Das v. Beswar Das	.. 576
Venkata Subbiah v. Venugopal	.. 292	Virupakshappa v. Shidappa	41, .. 521
Venkatamma v. Manikkam	790	Vithal v. Vithoji	500, 799
Venkataram v. Adamji	.. 849	Vithaldas Prabhu v. Subrayya	190, 528
Venkatasubbya v. Zamindar of Karvetnagar	629, 456, 457, 631, 632	Vithal v. Balkrishna	.. 343
Venkata Narasimha v. Papamma	.. 790	Vithoba v. Babu Lal	.. 131
Venkatammal v. Andyappa	710	Vithoba v. Tejiram	790, 797
Venkatachellamayya v. Nilakanta	.. 694	Vittal Singh v. Agarchand	579
Venkatachalapati Rao v. Kameswaramma	.. 219	Vishnu v. Achutt	868, 869
Venkatachellam Chetty v. Nagappa Chetty	.. 322	Vishnu v. Rampratap	.. 241
Venkatamma v. Manikam Nayani Varu	.. 202	Vishnu v. Yusuff	.. 526
Venkatappa v. Jalayya	.. 777	Vishnu v. Ramachandra	522 568 662
Venkatara jagopala v. Basivi	370	Vishvantha v. Virchand	.. 857
Venkata Krishnayya v. Narasimham	.. 599	Visvanath v. Pandarinath	.. 779
Venkata Subbiah v. Venkata Seshaiya	241, 243	Visvanatha v. Keymer	.. 515
Venkatachellam v. Veerappa	26	Visvanatha Chetti v. Arunachalan Chetti	.. 400
Venkatachellapathy v. Perumal	.. 649	Visvanathan v. Arunachalam	.. 849
Venkatesh v. Mallappa	.. 124	Viswanathan v. Somasundaram	547
Venkateswaran v. Raman	.. 139	Visvanath Chardu Naik v. Subraya Shivappa Shetti	.. 319
Venkatesvara v. Raman	.. 142	Viyathan Sridevi v. Neelakanth	.. 787
Venkateswara v. Secretary of State	.. 147	Vizagapatam Sugar Development Co v. Muthuram Reddy	.. 124

	Page		Page
Vuppuluri Somasundaram v. Kondayya ..	787	Whitworth v. Gangin	128, 129
Vuppu Seetharamayya v. Gopalakrishnamma ..	549	Willis v. Cooper	369, 370
Vyankaji v. Sarja ..	147	Williams Re ..	86
Vyankatraya v. Shivrambhat	127	Willows v. Ball ..	90
Vyapuri v. Chidambara ..	788	Wilson v. Kanhya Sahoe ..	823
Vyse v. Brown ..	105	Winfield v. Boothroyd ..	875
W		Winter v. Lightbound ..	818
Waddell v. Waddell ..	370	Wise v. Birkenshaw ..	112
Wagnaswami v. Chidambaranatha ..	500	Wishnath v. Rahmatullah ..	175
Wahdumal v. Tharo	786, 791	Womdo Khanum v. Rajroop.	232
Wahed Ali v. Jumaye ..	652	Woolley v. Morgan ..	818
Wahid Unnissa v. Girdhari	625	Wooma Churn Chowdhry v. Kumolay Kaminee Dabee.	39
Wahidunnissa v. Gobardhan Das ..	718	Woopendro v. Brojendro	447, 623
Wajib Khan v. Darghi Khan	122	Wotton v. Shirt ..	128
Wajihan v. Biswanath ..	6	Wren v. Wield ..	825
Wallian v. Banke Behari ..	518	Wright v. Cabot ..	283
Wali Mahomed v. Abdul Hamid ..	858	Wyman v. Knight ..	874
Wali Muhammad v. Turab Ali ..	23	Y	
Wallis v. Smith ..	284	Yakub Ali v. Durga ..	197
Warlow v. Harrison ..	434	Yates v. Terry	112, 307
Warner v. Jacob ..	448	Yellammal v. Ayyappa ..	184
Wasudev v. Hiralal	588, 601	Yellampalli v. Venkatappa v. Natam Manjappa ..	201
Watt, Re ..	206	Yelumalai v. Srinivasan ..	883
Watkins v. Lee ..	820	Yeshwant v. Govind	127, 506, 509, 715
Watson v. Lloyd ..	156	Yeshwant v. Shankar ..	369
Watson & Co. v. Ram Chand	88	Yeshwant Shenvi v. Vithoba Sheti ..	319
Watts v. Jefferyes ..	92	Yegambal v. Naina Pillai ..	606
Wazir v. Har Prasad ..	127	Young v. Lambert ..	94
Wazir Ali v. Janki Prasad ..	379	Yusuf Ali v. Aubas Ali ..	881
Wazir Narain v. Bhikari Ram ..	551	Z	
Wazizuddin v. Lala-Deekinandan ..	887	Zabardast v. Namta Prasad.	8
W. Dhar v. Htoon May ..	164	Zahuran v. Taylor ..	197
Web v. Stenton	105, 107, 108, 117, 170, 205	Zaibunissa v. Jairab Gir ..	198
Webster v. Webster	112, 206	Zainulabdin v. Mahammad Asgar Ali ..	571
Webster Re ..	206	Zaki Hasau v. Sambhu Dayal ..	632
Weldon v. Weldon ..	32	Zalim v. Kallu	12, 506
Wells v. Kilpin ..	366	Zamindar of Karvetnagar v. Trustee of Tirumalai	208, 272
Westhead v. Riley	397, 365	Zamindar Serimutu v. Virappa ..	180
Westoby v. Day ..	112	Zamania Begam v. Nihal Chand ..	520
Whalle v. Pepper ..	819	Zerkalce v. Lalle Doorga ..	5
Wetham v. Davey ..	405		
Whitley v. Edwards ..	107		

THE LAW OF EXECUTION

IN

BRITISH INDIA

VOL. II

CHAPTER XIV

Practice in Execution

What is execution—Application for execution—Oral application—Written Application—Contents of—Attachment of immoveables—Attachment of moveables—Amendment of application—Effect of amendment—Notice before execution—Simultaneous execution—Issue of process—Return of process—Mode of execution—Precepts—Decrees for money—Decrees for specific moveable property—Decrees for specific performance—Decrees for restitution of conjugal rights—Decrees for injunction—Decrees for execution of document or endorsement of negotiable instruments—Decrees for possession of immoveable property—When in the possession of judgment-debtor—When in the possession of tenant—Decree cannot be split up—Applicability of Or. 2, r. 2—Applicability of Or. 9—Applicability of Or. 22—Applicability of Or. 23.

“Execution, *executio*, signifieth in law the obtaining of actual possession of anything acquired by judgment of law or by a fine executory levied whether it be by the sheriff or by the entry of the party.”¹ It is “the act of carrying into effect the final judgment of a court or other jurisdiction. The writ which authorises the officer to carry into effect such judgment is also called an execution.”² In a

What is execution.

1. Co. Lit. 154 d.

2. Bouvier's Law Dict., tit, Execution.

practical sense, it "is the formal method prescribed by law, whereby the party entitled to the benefit of a judgment or of an obligation equivalent to judgment may obtain that benefit."¹

Application
for execution.

"Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof."²

Oral
application.

"(1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court."³

Written
application.

(2) Save as otherwise provided by sub-rule (1) every application for the execution of a decree shall be in writing signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars namely :—

- (a) the number of the suit ;
- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;

1. Bingham on JUDGMENT AND EXECUTION.

2. C. P. C., O. 21, r. 10 (=Old Code, S. 230).

3. On this, see Chapter on ARREST AND DETENTION. Against such arrest no privilege can be claimed, see C. P. C., S. 135 (3) *post*.

- (e) whether any, and (if any) what payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required, whether—
 - (i) by the delivery of any property specifically decreed ;
 - (ii) by the attachment and sale, or by the sale without attachment, of any property ;
 - (iii) by the arrest and detention in prison of any person ;
 - (vi) by the appointment of a receiver ;
 - (v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may² require, the applicant to produce a certified copy of the decree.”²

1. Omission to state payment is not material, *Kangal Chandra v. Nandalal*, (1934) Cal. 465=151 I. C. 1015. Grounds of exemption from limitation must be stated, *Kaliandas v. Mahomed Khan*, (1933) Sind 365.

2. In taking out execution, a decree-holder is not bound to produce the original decree or even a copy. *Ramdhun Rukhit v. Panchanun Chuckerbuly*, (1868) 10 W.R. 144.

3. O.P.C., O. 21, r. 11 (=Old Code, Ss. 256, 235). Cf. R.S.C., O. 42, r. 12.

the description given.¹ In the case of a joint family, the family property or the share of the judgment-debtor in it must be specified.²

Attachment
of moveables.

"Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached containing a reasonably accurate description of the same."³ On the effect of an omission to give the inventory or description of property as required by these rules there is a difference of opinion.⁴

Amendment
of application.

"(1) On receiving an application for the execution of a decree as provided by rule 11, (2), the Courts shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.⁵

1. *Harry Charan v. Subaydar*, (1885) 12 Cal. 161; *Wajihan v. Biswanath*, (1901) 28 Cal. 462.

2. *Muhammad v. Dipchand*, (1892) 14 All. 190; *Agarchand v. Rakhma*, (1887) 12 Bom. 678.

3. C. P. C., O. 21, r. 12 (=Old Code, S. 236.)

4. See Vol. I, page 413 *supra*; *Abdul Rafl Khan v. Maula Baksh*, (1915) 37 All. 527.

5. For a case of wrong admission, see *Ahmed Ali v. Mt. Fatima* (1934) 152 I. C. 443. For a case of wrong return, see *Mannilal v. Ram Kishore*, (1933) Oudh 288=144 I. C. 288.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree."¹

Under the Code of 1882, it was doubtful if a Court had any power to amend after admission and registration, though applications for execution were often allowed to be amended without objection.² Under that Code, an application not complying with the provision of rules 11 to 14, if amended, was to date, for purposes of limitation, not retrospectively from the date of original presentation, but from the date of the amendment, so that if the amendment was made out of time, the application was barred.³ The present rule obviates the difficulty.⁴

Effect of amendment.

This rule is an enabling provision which allows certain defective applications subsequently amended to be deemed applications in accordance with law with effect from the date of their first

1. C. P. C., O. 21, r. 17 (=Old Code, S. 245.)

2. *Macgregor v. Tarinichurn*, (1887) 14 Cal. 124 ; *Asgar v. Troilokyanath*, (1890) 17 Cal. 636 ; *Sattappa v. Jogi Soorappa*, (1893) 17 Mad. 67 ; *Jiwat v. Kalicharan*, (1896) 20 All. 478. See also *Chaurasi v. Bhagan Sahu*, (1923) 2 Pat. 787.

3. See *Gopal v. Janki Koer*, (1896) 23 Cal. 217 ; *Raghunatha v. Venkatesa*, (1903) 26 Mad. 101.

4. *Abdulla v. Ganesh Das*, (1933) 60 Cal. 662 P. C. See also vol. I, page 414-5 *supra*.

presentation. It does not affect the construction put upon the words "in accordance with law" in Article 182 of the Indian Limitation Act in dealing with formal defects in applications.¹ It has nothing to do with the invalidity of the sale made to a stranger who bought without notice of the fact that the amount realised by previous sale of other lots of the property attached was more than sufficient to satisfy the decree in execution.² In framing rule 11 (2) the Legislature had apparently in view that the application should be such upon which the Court would be justified in taking action and and this rule provides that the Court should, on receiving an application, ascertain whether the requirements of rule 11 etc., have been complied with.³

If the amount due under the decree has been overstated in the application, execution may issue for the amount due, without the need for amending the application.⁴

Where the application presented does not conform to the provisions of rules 11 to 14, the Court is bound to and has the power either to reject the application or allow the defect to be remedied by amendment.⁵ The Court is not expressly bound to reject an incorrect application for execution, but to reject it unless it is amended within the time

1. *Kamatchiammal v. Pitchu Iyer*, (1916) 31 M. L. J. 561 = 35 I. C. 876.

2. *Surendranath v. Bolaram*, (1918) 45 I. C. 699.

3. *Gopal v. Janki Koer*, (1896) 23 Cal. 217. See Vol. I. page 399.

4. *Zabardast v. Kamta Prasad*, (1895) A. W. N. 18.

5. *Choudhuri Chintamani v. Monmohini*, (1922) 1 Pat. 149 ; *Ganesh v. Fatteh Chand*, (1920) 2 Lah. L. J. 104 = 55 I. C. 16.

allowed or the decree-holder can show that it does not require amendment.¹

Unless an application complies with the requisites of these rules and specifies the particulars therein mentioned, it is not an application in accordance with law, that is, with the law relating to the execution of decrees. It cannot therefore be of avail to save limitation.² Where an application was made before the expiry of the period of limitation for filing a list of immoveable properties which had not been filed along with the application for execution, and the Court granted it, but when the list was actually filed, the limitation had run out, it was held that the execution was barred, for it could not be said that the Court in permitting the list to be filed was acting under rule 17 (i), because the application had not been amended according to the provisions of rule 17 (i), as no time was fixed by the Court as provided in it.³ But when the application for execution was on the face of it in accordance with law and when it was discovered that the properties specified in the list could not be taken, the decree-holder made an application for accepting a further list and for proceeding with the execution, it was held that the supplemental list should be taken as part of the original application or if a fresh application were at

1. *Meghraj v. Abdul Majid*, (1921) 63 I. C. 971 ; *Bhagwant Prasad v. Dwarka Prasad*, (1923) 2 Pat. 809.

2. See for discussion, pages 402 et seq. *supra*; also *Satish Chandra v. Purna Chandra*, (1911) 11 I. C. 696. For immaterial informalities, see page 413 *supra*; *Kanji Mal v. Kidarnath*, (1919) 32 P. W. R. 1919=49 I. C. 982; *Guru Mahadeva v. Mahabir Sukul*, (1922) 65 I. C. 120; *Prasanna Kumar v. Jotindranath*, (1923) 71 I. C. 1054.

3. *Salimullah v. Sainaddi Sarkar*, (1913) 18 C. L. J. 538=22 I. C. 337.

all necessary, then the subsequent application furnishing a further list should be treated as one made in continuation of the earlier application.¹ In *Chaurasi v. Bhagan Sahu*,² it was said that an application to file a fresh list of properties against which execution is also prayed for was not an amendment of the pending application and that when once an application had been registered under rule 11, no amendment was possible thereafter.

This rule does not take away the power of the Court to amend an application for execution at any time before its disposal. Where an application was presented within 12 years of the decree, but an amendment which was necessary was made after the decree was 12 years old, it was held that nevertheless Section 48 C. P. Code did not bar the application.³

Notice before
execution.

“(1) Where an application for execution is made

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application

1. *Gnanendra Kumar v. Rishendra Kumar*, (1918) 27 C. L. J. 398 = 44 I. C. 553.

2. (1923) 2 Pat. 787.

3. *Vemuri Pitchayya v. Raja Yarlagaadda*, (1923) 45 M. L. J. 651. But see *Contra Chaurasi v. Bhagan Sahu*, (1923) 2 Pat. 787.

for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribe if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.”¹ “Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed. Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.”²

The notice under rule 22 must, where the decree has been transmitted to another Court for execution, be issued by the latter Court.³ In cases where the Court dispenses with notice before execution, it is provided that the reason for so doing must be recor-

1. C. P. C ; O. 21, r. 22 (=Old Code, S. 248). See for a full discussion, page 363 et seq. *supra*.

2. *Ibid.* r. 23 (=Old Code, S. 249.)

3. *Chatterpat Singh v. Sait Somarimull*, (1916) 43 Cal. 903 F.B.; *Sripaticharan v. Belchambers*, (1910) 15 C. W. N. 661=8 I. C. 22.

ed. But an omission to record the reason or the issue of execution in the absence of sufficient cause, would not affect the jurisdiction of the Court and the omission is only an irregularity.¹

Issue of
process.

“Where the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree. Every such process shall bear date the day on which it is issued and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed. In every such process a day shall be specified on or before which it shall be executed.”²

The rule requires the delivery of the process to the proper officer to be executed, but it does not mean that the proper officer should himself execute the process. Such officer may depute a subordinate officer for execution.³ But a warrant addressed to the peon of a Court cannot be executed by the Nazir or his nominee or beyond the time fixed under it.⁴ A warrant not bearing the signature of the Judge or the officer is bad⁵ and one without the Court's seal is equally so,⁶ so that an execution on such

1. *Kasivisvanathan v. Somasundaram*, (1922) 42 M. L. J. 422 = 70 I. C. 611; *Girwar Sahai v. Mangal*, (1923) 73 I. C. 241.

2. C. P. C., O. 21, r. 24 (= Old Code, Ss. 250 and 251). As to the effect of absence of notice, see chapter on VOID SALES.

3. *Abdul Karim v. Bullen*, (1884) 6 All. 385; *Dharam v. Queen Empress*, (1895) 22 Cal. 596; *Sheo Prakash v. Bhoop Narain*, (1895) 22 Cal. 759.

4. *Subed Ali v. Emp.*, (1913) 40 Cal. 849.

5. *Ram Dayal v. Mahtub*, (1885) 7 All. 506. But initials will do, *R. v. Janki Prasad*, (1886) 8 All. 293.

6. *Khadir Bux v. Emp.*, (1918) 3 Pat. L. J. 636 = 49 I. C. 171.

process is illegal. The warrant should specify the date on or before which it must be executed¹ and if the time is extended the date of extension should be specified on the warrant.² A material alteration in a writ by the plaintiff after its issue, without leave of Court will make the writ void as against the plaintiff and all others having notice of the unauthorised alteration³ A renewal of writs by change of dates is sanctioned by usage. The fact that a writ has been returned before the return day thereof does not impose upon the plaintiff the duty of waiting until that day before he can take out a second or alias writ.⁴

“ Valid warrant is complete protection to the officer arresting even though it be known it was procured by fraud. If a warrant is not valid on its face, or if the whole subject-matter is without the jurisdiction of the magistrate the officer is really acting without any warrant at all and thereby becomes a trespasser, if a private person under the same circumstances would be a trespasser A warrant is void, if it has no seal when a seal is required by statute or if it does not sufficiently describe the person to be arrested, so that from the description he may be identified ; as where a warrant is issued against ‘ John Doe or Richard Doe, whose other or true name is to your complainant unknown,’ with no other description or means of identification, the warrant is absolutely void and may be resisted with all necessary force.....As a general rule, if the warrant is materially defective,

1. *Mohini v. R.*, (1916) 1 Pat. L. J. 550=36 I. C. 871 ; *Anandlal v. R.*, (1884) 10 Cal. 18 ; *Abinash v. Ananda*, (1904) 31 Cal. 424.

2. *Sheikh Nasur v. Emp.*, (1909) 37 Cal. 122.

3. *Freeman on EXECUTIONS*, I. 212.

4. *Ibid.* I. 248.

or the officer exceeds his authority in executing it, any third person may lawfully interfere to prevent an arrest under it, doing no more than is actually necessary for that purpose."¹

"An officer cannot be protected by a warrant that is not issued to himself to serve, nor is he protected unless he has authority to serve it.² A warrant must be directed to the proper officer either by name, or by a description of the office which he holds.³ It must command the arrest and not leave it optional with the officer to arrest or not as he may choose."⁴

"A warrant remains in force until it is returned; even if the accused has been arrested and escapes he may be retaken on the same warrant, if it has not been returned. After its return, however, it has no validity; nor can it be altered, for its life is then extinct."⁵

"The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court. Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon

1. Voorhee's LAW OF ARREST, 56-8.

2. Voorhee's LAW OF ARREST, 27.

3. *Rex v. Weir*, 1 Barn. and Cres. 288.

4. *Reg v. Downey*, 7 Q. B. 281.

5. Voorhee's LAW OF ARREST, 23.

and examine witnesses as to such inability, and shall record the result.¹ The Court may issue a fresh warrant on the same application.

Even though a warrant be issued by a Court of competent jurisdiction over both party and subject-matter, and though the warrant be fair and valid upon its face, it is of no protection whatever to the officer if he does not return it to the Court after he serves it.² "The effect of the return by the officer is that, as against himself, it is conclusive proof of the service and of the other facts which it recites, while as against the parties, it is at least *prima facie* proof, and in more cases, it is conclusive proof against the parties also. In an action against a public officer his return is *prima facie* but not conclusive in the suit in which it is made. Nor is a return of a rescue on a writ conclusive evidence in behalf of the officer in an action brought against him for the escape of a prisoner. An officer cannot be permitted to introduce evidence to show that although he has omitted to mention in his return that he has done things which he should have done, he has nevertheless done them. And he will not be allowed to contradict his own return for his own benefit. The return, by permission of the Court, may be amended by the officer."³

Return of
process.

The application should state the mode in which the assistance of the Court is required.⁴ The mode of execution must be adapted in each case to

Mode of
execution.

1. C. P. C., O. 21, r. 25 (=Old Code, S. 343). Cf. R. S. C., O. 42, r. 6.

2. *Shortland v. Govett*, 5 B. and C. 485; *Middleton v. Price*, 1 Wills. 17.

3. Voorhee's LAW OF ARREST, 23-4.

4. *Sha Karam Chand v. Ghela Chari*, (1895) 19 Bom. 34; and page 73 *supra*.

the nature of the particular relief sought to be enforced under the decree.¹ Where in different districts different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another, of such districts is to be executed, the executing Court must be guided by the rules in force in its own district.² Simply because a decree declares that the boundary line laid down in the survey-map as the boundary line of the plaintiff's permanently settled estate is not the true boundary line, the decree-holder is not entitled either to have the decree proclaimed on the spot, or to have the line erased from the survey-map.³

Simultaneous
execution.

The Court may in its discretion, refuse execution at the same time against the person and property of the judgment-debtor,⁴ but Order 21 rule 11 C. P. Code is no bar to the grant of simultaneous execution.⁵ An appeal lies against an order for simultaneous execution on the question whether the discretion has been properly exercised.⁶

A decree may be executed simultaneously in two or more districts. Though a decree is transferred to another court for execution from the Court which passed it, the latter Court does not thereby lose all jurisdiction in respect of execution,⁷ so

1. *Martand v. Vinayak*, (1907) 31 Bom. 5.

2. *Denonath Rukhit v. Mutty Lall Paul*, 1 Ind. Jur., O. S. 125.

3. *Rajah Raj Krishna Singh Bahadur v. The Collectors of Mymensingh*, (1873) 19 W. R. 232.

4. Order 21 rule 21, (=Old Code, S. 230).

5. *Ram Sumran v. Baburam*, (1923) 2 Pat. 328.

6. *Chena Pemaji v. Ghelabhai*, (1883) 7 Bom. 301.

7. *Kristokishore v. Rooplali*, (1882) 8 Cal. 687; *Baijnath v. Holloway*, (1990) 1 C. L. J. 315; *Saroda Prosad v. Luchmееput*, (1872) 14 M. I. A. 529; *Sarash Prasad v. Peoples Industrial Bank*, (1917) 15 A. L. J. 532=39 I. C. 729; *S. R. R. M. C. T. Chetty v. Bowsinga*, (1921) 14 Bur.L. T. 235=63 I. C. 809. See also page 410 *supra*.

that if the Court thinks fit and the needs of the case justify it, execution can issue from the Court that passed the decree, though the decree has been transferred elsewhere for execution. If, for instance, the judgment-debtor has no immoveable property within the jurisdiction of the Court that passed the decree, and the decree is therefore transmitted to another Court within whose jurisdiction such property is situate and if after such transmission, the judgment-debtor happens to come within the jurisdiction of the Court that passed the decree or to have a debt due to him, the decree-holder can by an urgent application ask the Court that passed the decree to issue execution against the person of the judgment-debtor or against the garnishee. We have the analogy of concurrent summonses in suit sent to the defendant, when the plaintiff feels uncertain over the whereabouts of the defendant. The decree-holder may also ask the Court that passed the decree to transmit the decree to two districts for execution at the same time and the Court will do it under Section 37, if it sees sufficient reason to do it.¹ The power to allow execution in several places at the same time under the same decree should be sparingly exercised and in any case the Court should impose the condition on the decree-holder not to proceed to sell under all attachments at once.²

“By the common law, the various remedies to enforce the collection of judgments were regarded as cumulative. The mere fact that a *ca. sa.* had issued

1. See *Sivakolundu v. Ganapathi*, (1916) 3 L. W. 336 = 34 I. C. 302.

2. *Sarada Prasad v. Lachmeepat*, (1872) 14 M. I. A. 529; *Krist Krishore v. Eoplat*, (1882) 8 Cal. 687; *Rāmās Āgarwala v. Garucharan*, (1909) 11 C.L.J. 69 = 2 I. C 105. See Vol. I, page 82.

was no bar to a *fi. fa.*, nor was the issuing of the latter any bar to the issuing of the former. The plaintiff took out as many writs of different kinds as he thought best, he being answerable for any abuse he might make of his process. A *fi. fieri facias* and a *capias ad satisfaciendum* may issue at the same time against the goods and person of a defendant. So a party, having sued out one writ of execution, may, before it is executed, abandon that writ, and sue out another of a different sort : or he may have several writs of the same sort running at the same time in order to take the defendant or his goods, in different counties. The right of the plaintiff to have several writs of execution in existence at the same time is dependent upon their necessity to enforce his judgment or more accurately speaking, the right cannot be affirmed when the use or execution of two or more writs is clearly unnecessary. He will not be permitted to harass the defendants with needless writs nor to divide the judgment into parts and issue a writ for each There is ordinarily no necessity for the plaintiff to have more than one writ of the same tenor or character in the hands of the same officer; for it is manifest that one writ must be as efficient as many. Hence, it is irregular to issue two or more writs of the same character to the same county or officer and one of such writs must, if a motion is made to that effect, be quashed If there is authority for the issuing of a writ to a county other than that in which the judgment was recovered, the remedies to issue the writ to the different counties are concurrent and hence a writ to each of the counties may properly issue or be in existence at the same time. ”

1. Freeman ON EXECUTIONS, I. 111—113.

Closely allied to the subject of simultaneous Precepts. execution is the system of Precepts, introduced by the Civil Procedure Code of 1908. By Section 46, it is enacted that

“(1) Upon the application of the decree-holder the Court which passed the decree, may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree.

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for the sale of such property.”

The Select Committee said “Though a system of execution based on precepts is, in the opinion of the Committee, open to grave objection, they think the idea may be utilized for the purpose of enabling a decree-holder to obtain an interim attachment when there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have for this purpose introduced clause 46 into the Bill. They think it expedient to fix a time limit for the continuance of this interim attachment, but at the same time they have empowered the Court to extend the period to meet the exigencies of

particular cases. After careful consideration they have come to the conclusion that notwithstanding attachment under a precept, re-attachment on the ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of a precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regard to the agency by which execution is carried into effect."

This section forms an exception to the general rule that execution cannot issue against property beyond the local limits of the jurisdiction of an executing Court and was designed to secure to the decree-holder the fruits of his decree, when otherwise the judgment-debtor may take advantage of the processual delay of the transmission of decree from one Court to another.

An attachment under precept is not invalidated by the fact that the order extending the statutory period of two months during which the attachment will remain in force is passed after the expiry of the said period, provided that the application for extension of time is made before expiry of the said two months. In such a case the order relates back to the date of the petition and has retrospective effect.¹ An objection to the jurisdiction of an executing Court to order the sale of certain property attached by it under the precept of another Court based on the want of transfer of the decree to that Court for

1. *Sivakolundu v. Ganapathi*, (1916) 3 L.W. 336=34 I. C. 302. See *Somasundaram v. Muthuveerappa*, (1910) 4 Bur. L. T. 89=10 I. C. 794, under C. P. C., Order 38, rule 5.

execution will not be allowed to be taken for the first time during the hearing of an appeal against an order for sale.¹

“Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief², may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.”³

Decree for money.

Where judgment-debtors are minors, women or legal representatives, a personal decree does not carry with it the right to arrest them.⁴ There is an option to the creditor of enforcing his decree either against the person or the property of the debtor, and the fact that the decree had been passed *ex parte* makes no difference.⁵ The Court should execute its decree as directed by law and not according to the consent of the judgment-debtors and the order of a judgment-debtor upon a paymaster to satisfy a decree out of his salary does not affect it.⁶

A preliminary attachment is not necessary in the case of an application for execution of a decree for sale of mortgaged property or for sale of specified property in default of payment of money.⁷

Mortgage decree.

Whether it is competent to the mortgagee after

1. *Ibid.*

2. For instance, in the case of delivery of moveables C. P. C., O. 20, r. 10.

3. C. P. C., O. 21, r. 30 (=Old Code, S. 254). Cf. R. S. C., O. 42, r. 4.

4. *Jiwandas v. Janki*, (1922) 18 N.L.R. 145=65 I.C. 53.

5. *Raj Chunder Roy v. Shama Soondari Debi*, (1879) 4 Cal. 583.

6. *In re Macfarlane*, (1869) 11 W. R. 69.

7. *Iqbal Narain v. Jaskaran*, (1918) 5 O.L.J. 414=47 I. C. 639; *Jagannath v. Debi Prasad*, (1923) 2 Pat. 768.

decree to abandon his claim against the mortgaged property and proceed against the person or other property of the mortgagor depends entirely on the construction of the decree.¹ The object of the rule requiring the mortgagee to completely sell the hypotheca before obtaining a personal decree is that the personal liability of the mortgagor should not be improperly increased. It is not however the law that a personal decree cannot be obtained in any case when the whole of the property directed to be sold has not been sold for whatever the cause may be. If a portion of the hypotheca has since the date of the decree become not available for sale by the action of other claimants and not through the acts or default of the mortgagee the latter can obtain a personal decree against the mortgagor.² The mortgagee-decreeholder can proceed against the other properties of the mortgagor if the mortgage is found invalid or for one reason or other he has been unable to bring the whole of the mortgaged property to sale.³

1. *Monit Kamoji v. Chodimalla Ramamurti*, (1908) 3 M. L. T. 355; *Varadiah v. Kumara Venkataperumal*, (1914) 26 M. L. J. 83=21 I. C. 782.

2. *Satish Ranjan v. Mercantile Bank of India*, (1918) 45 Cal. 702; *Chand Mall v. Ban Behari*, (1923) 50 Cal. 718. See *Ram Ranjan v. Indra Narain*, (1906) 33 Cal. 120; *Suraja Kumar v. Promoda Sundari*, (1913) 17 C. W. N. 1039=20 I. C. 829; *Arunachela v. Vahkatarama*, (1919) 35 M. L. J. 93=57 I. C. 84.

3. *Periasami v. Muthia*, (1915) 38 Mad. 677; *Srinivasa Aiyangar v. Kundasami*, (1914) 24 M. L. J. 375=23 I. C. 644; *Cheriyonni v. Nehra Poyile*, (1911) 22 M. L. J. 47=13 I. C. 174; *Kedarnath v. Chandu Mal*, (1903) 26 All. 25; *Ghafur Hasan v. Muhammad*, (1905) 28 All. 19; *Pirbhu Narain v. Amir Singh*, (1907) 29 All. 369; *Darbari Mal v. Mula Singh*, (1920) 42 All. 579; *Gopal Panda v. Baikunta Mahapatro*, (1917) 2 Pat. L. J. 538=42 I. C. 56; *Rakhal Chandra v. Sidhinath*, (1919) Pat. 390=53 I. C. 922; *Samanta Gagarnath v. Lokenath*, (1921) 61 I. C. 635; *Jaycrbhai v. Gordhan*, (1914) 39 Bom. 358.

When the property mortgaged was subject to several mortgages so that it was not bid for at the sale, the mortgagee was held entitled to apply for a decree under s. 90 Transfer of Property Act on abandoning all claims on the mortgaged property.¹

Where the holder of a decree for money, which directed the sale of immoveable property for its satisfaction, applied for execution of the decree against the judgment-debtor personally and it appeared that the decree-holder's brother was able, owing to the existence of such decree, to purchase such property for a very low price in execution of another decree against the judgment-debtor, it was held that Courts were not debarred from applying equitable principles to the questions that arose in proceedings relating to execution of decrees, and that, in the circumstances of the case, the decree should be executed first against the hypothecated property in the hands of the decree-holder's brother, and that, should it prove insufficient to satisfy the debt, the judgment-debtor might then be proceeded against personally.² Where a person, who purchases in execution of a money-decree property subject to a mortgage, subsequently becomes the holder of the decree obtained in such mortgage, it would be inequitable to allow him to execute such mortgage-decree against the other property of the mortgagor-judgment-debtor, if it appears that he bought the mortgaged property knowing it to be mortgaged, or that he purchased it in consequence of the mortgage for a smaller sum than it would otherwise have fetched.³

1. *Ram Raghubar v. Imani Begam*, (1910) 14 O. C. 219=9 I. C. 403.

2. *Wali Muhammad v. Turab Ali*, (1882) 4 All. 497.

3. *Gulab Singh v. Pemian*, (1883) 5 All. 242.

Decree for
specific move-
able property.

“(1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable, or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor or by the attachment of his property, or by both. (2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and in other cases such compensation as it thinks fit, and shall pay the balance if any to the judgment-debtor on his application. (3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.”¹ This rule is applicable only where the property sought to be attached is in the possession of the judgment-debtor.

The words for the recovery of a wife included in section 259 of the Code of 1882 have been omitted, for there can be no decree under the law for the recovery of a wife as a wife cannot be treated as a chattel to be delivered over to the husband.²

1. C.P.C., O. 21, 31 (=Old Code, S. 259). Cf. R.S. C. O. 42, r. 6.
2. *Pudmanand v. Chundi Dat*, (1896) 1 C. W. N. 170.

Moveable property decreed to be delivered must be delivered if capable of delivery ; otherwise assessed damages should be paid.¹ A decree being given for specific moveables and the amin directed to ascertain their value, an order was made in execution for the amin to give possession of such moveables as could be found and to inquire into the nature and value of those that could not be found. It was held, on appeal, that this order was not one for alternative damages, but to enable the Court if necessary to make a sufficient and not excessive order for imprisonment or attachment of property in the event of non-delivery.² No order of arrest of the judgment-debtor will issue without notice.³ There is no provision of the Code which authorises a Court to pass an order calling upon a defendant to appear in Court and produce property decreed to plaintiff.⁴ To enforce the decree obtained by the stringent methods of Order 21, rule 31, the plaintiff should allege and prove facts necessary to bring the case under section 11 of Specific Relief Act.⁵

“ Where the party, against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of

1. *Kashee Nath Koer v. Deb Kristo Ramanooj Doss*, (1871) 16 W.R. 240.

2. *Bhoobun v. Govind*, (1873) 19 W. R. 82.

3. *Troylukhonath v. Radharam*, (1898) 3 C. W. N. xxx, ix.

4. *Bhoza Rughbur Sing v. Bhoza Raj Singh*, (1871) 3 N.W.P. 319.

5. *Venkata Subba Rao v. Asiatic Steam Navigation Co.*, (1915) 39 Mad. J.F.B.

conjugal rights by the attachment of his property or, in the case of a decree for specific performance of a contract or for an injunction, by his detention in the civil prison, or by the attachment of his property, or by both.”¹

“Where a party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.”²

The rule applies to all injunctions prohibitory or mandatory.³ Where an injunction is granted, the decree may be enforced on each successive breach of it by an application made within three years of such breach under Art. 181 of the Limitation Act⁴ and a separate suit to enforce the injunction is not maintainable.⁵ Under the Code of 1882, the words used were an order requiring the ‘performance of or abstention from any particular act’ and in their place the term ‘injunction’ has been substituted. This word ‘injunction’ as here used has a more extended meaning than it has under the Specific

1. C.P.C. O. 21 r 32 (1). (=Old Code S. 260). see R.S.C., O. 42 r. 30.

2. C.P.C., O. 21 r. 32 (2), as amended by Act XXIX of 1923; see R. S. C., O. 42, r. 31.

3. *Sachi Prasad v. Amarnath*, (1919) 46 Cal. 103 (107); *Venkatachellam v. Veerappa*, (1906) 29 Mad. 314; *Velu Manikaran v. Pakarvoor Manakal*, (1910) 21 M.L.J. 465=6 I.C. 289.

4. *Venkatachellam v. Veerappa*, (1906) 29 Mad. 314; *Sachi Prasad v. Amarnath*, (1918) 46 Cal. 103; *Ram Saran v. Chatar Singh*, (1901) 23 All. 465. See *Ahmed v. Paker*, (1922) 5 Bur. L. T. 116=15 I. C. 945 (where Art. 182 was applied); *Alagappa v. Kanakasabai*, (1918) 7 L. W. 563=45 I.C. 689. See also Vol. I, page 486.

5. *Sachi Prasad v. Amarnath* (1918) 46 Cal. 103.

Relief Act. It is not every order of a Court directing a person to do a certain act, that is an injunction. In its essence an injunction is a relief consequential upon the infringement of a legal right. An order directing a defendant to render accounts within a specified time does not therefore come within the present rule and a disobedience of it is not punishable under it.¹

Before directing execution for disobedience of the decree, the Court has to see if the judgment-debtor had an opportunity of obeying the order and has wilfully failed to do so.² The Court may properly issue a notice to the defendant to obey on an application for execution.³ When the disobedience is clear, the judgment-debtor is not entitled to notice or further opportunity for action unless the Court chooses to do it.⁴ If the decree directs the defendant to deliver articles needed for the performance of worship by a priest in a temple, the plaintiff is not entitled to execute the decree unless he proves that he went to the temple to recover the articles after notice to the defendant and the defendant refused to deliver the articles.⁵ Where an application is dismissed for want of opportunity given to the judgment-debtor to obey the decree, a fresh application is not barred, after such opportunity has been afforded to him and

1. *Arjun v. R.*, (1918) 3 Pat. L. J. 106=44 I. C. 737 (The decisions in 7 Cal. 654 and 27 All. 374 on the effect of s. 263 of the old Code have now been overruled by this rule.)

2. *Umed Kika v. Nagindas*, (1870) 7 B. H. C. O. C. 122 ; *Gaya Prasad v. Bihari*, (1883) A.W.N. 149.

3. *Protab Chunder v. Pyari*, (1887) 8 Cal. 174.

4. *Durga Das v. Dewraj*, (1906) 33 Cal. 306. See *Gauri Prasad v. Bholonath*, (1831) 8 C. L. R. 487.

5. *Kishore Bun v. Dwarkanath*, (1894) 21 Cal. 784 P. C.

the judgment-debtor is found to be at fault.¹ Upon a motion to rectify the register of a company where it appeared that there was no one having authority to carry out the order of the Court, the Court refused to make an order under this rule in the first instance, but issued a mandate on the company to rectify, leaving the parties to make a subsequent application in case of non-compliance.² Where in an action for specific performance of an agreement to make a road, judgment was given for the plaintiff and the defendant gave an undertaking to complete the road, before a date fixed by the Court, it was held that the case did not fall within the rule but that the Court would enforce the undertaking by allowing the plaintiff to complete the road and to apply for an order against the defendant for payment of the costs.³ A motion for sequestration against a Ry. Co. for breach of injunction restraining a nuisance can be ordered to stand over for a short time to enable the company to remove the nuisance.⁴ In default, the directors of the company can be detained in prison,⁵ after a personal service of the order.⁶ The Court has no power under the rule to seek the assistance of the police to see the decree carried out. Where a decree declared the plaintiff's right to perform certain ceremonies in a temple and restrained the defendants from obstructing the performance, the Court cannot order the police to see the defendants kept out from obstructing the plain-

1. *Ibid.*

2. *Re L. L. Syndicate*, 17 T.L.R. 711.

3. *Mortimer v. Wilson*, 33 W.R. 927.

4. *Cocks v. G.W.R.*, 3 T.L.R. 92, 505.

5. *Lewis v. Pontypridd etc. Ry. Co.*, 11 T.L.R. 203.

6. *Mc Keown v. Joint Stock Institute*, (1899) 1 Ch. 671.

tiff in the performance of the ceremonies.¹ Even a temporary disobedience of the order can be punished and any subsequent obedience is not a bar to its execution. The Court has no power to order the person disobeying to execute a security bond for its obedience.²

“ Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds, the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on application. Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.”³

This provision supplies a means of punishing disobedience and is not intended to be a satisfaction of the decree. If therefore a successful decree-holder in a possessory suit has under this rule received some compensation for an injury done, he can still enforce a right to the possession of the property found under the decree to be his.⁴ The rule is punitive and must receive a strict construction.

1. *Goswami Gordhan v. Goswami Madhusudan*, (1918) 40 All. 646.

2. *Aiyannachariar v. Vathiar Ramanuja Aiyangar*, (1916) 1 M. W. N. 147 = 32 I. C. 698.

3. C.P.C., O., 27 r. 32 cl. (3) and (4). A Court cannot compel a plaintiff to part with his legal rights and accept a compensation against his will, *Govind v. Sadasiv*, (1892) 17 Bom. 171.

4. *Ahmadi v. Amanat*, (1904) 1 A.L.J. 431.

Where a sale is ordered under it, the following conditions must exist : (a) a valid original attachment, (b) application within one year of that attachment by decree-holder for sale (c) lapse of one year from date of attachment. Where therefore an order of attachment was made on 27th June 1908 and was carried out on 20th July 1909, the attachment ceased to exist and a sale held thereon was set aside.¹

“Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.”² The Code of 1882 contained no provision similar to this and where a decree directed a mandatory injunction, such as for removing an obstruction, by pulling a wall down or opening a pathway, and the defendant disobeyed the order, the Court had no authority to depute any of its officers to do the act, as it was not a mode of execution recognised by the Code.³ This rule therefore is intended to re-

1. *Badri Pershad v. Fakira*, (1911) P.L.R. 170=10 I.C. 341.

2. C.P.C, O. 21 r. 32, cl. 5.

3. See *Bhooban Mohun v. Nobin Chunder*, (1872) 18 W.R. 282, *Protab Chunder v. Peary*, (1887) 8 Cal. 174; *Sakaral v. Bai Parvati*, (1902) 26 Bom. 283; *Durga Das v. Dewraj*, (1906) 33 Cal. 306 (309). Where injunction was to keep a door closing for ever reopening it after a formal closing is disobedience, *Habibullah v. Abdulla*, (1913) 12 A. L. J. 347=23 I. C. 247. See *Maluka v. Sundar-singh*, 1923) 5 Lah. L. J. 70.

move this obstacle in the way of giving practical effect to the decree and the Court can now get the act done by the decree-holder or any other nominee and levy the costs from the judgment-debtor.¹

“(1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree for the restitution of conjugal rights against a husband or at any time afterwards, may order that the decree shall be executed in the manner provided in this rule. (2) Where the Court has made an order under sub-rule (1) it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments. (3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just. (4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.”²

Decree for
restitution of
conjugal
rights

Under the Code of 1882, the Court had no discretion to refuse to execute a decree for restitution of conjugal rights by detention in prison and by attachment of property.³ But this mode of execu-

1. *Sachi Prosad v. Amarnath*, (1919) 46 Cal. 103.

2. C. P. C., O. 21, r. 33, as amended by Act XXIX of 1923.

3. See *Moonshie Bazloer v. Shumshoonissa*, (1867) 8 W. R. 3 P. C.

tion having been abolished in England by the Matrimonial Clauses Act¹ the present Code relaxed the rule, by leaving it to the discretion of the Court to allow or refuse an application for detention in prison² and the Courts did not ordinarily pass such order.³ In consequence of the amendments made in this and the preceding rule by Act XXIX of 1923, in the case of a decree for restitution of conjugal rights, the remedy by detention in prison has been abolished, so that where the decree is against a wife, the only remedy of the husband is by attachment of her property and recovery of compensation. The amount of compensation is left to the discretion of the Court and may be assessed on all reasonable considerations. Where a decree for restitution of conjugal rights is disobeyed, the wife loses her claim for maintainance against her husband.⁴ Where the wife is a minor the parents can be directed to hand over custody of the minor and in case of default to show reasonable cause.⁵ Where a woman, who had been directed by the decree to refrain from preventing her daughter returning to her husband, permitted the daughter who was of age, to reside in her house, it was held that such conduct did not constitute a breach of the injunction.⁶

“(1) Where a decree is for the execution of a document or for the endorsement of a negotiable

1. (1884) 47 and 48 Vict. c. 68, *Weldon v. Weldon*, 52 L. T. 233.

2. *Sivarama v. Veerappa*, (1914) 23 I. C. 828.

3. *Bai Parvathi v. Ganichi Mansukh*, (1920) 44 Bom. 972. See however *Jagannath v. Basant Ram*, (1923) 75 I. C. 24.

4. *Bai Parvati v. Mansukh Jetha*, (1919) 44 Bom. 972; *Amir Bibi v. Nur Mahomed*, (1923) 73 I. C. 716.

5. *Sivarama v. Veerappa*, (1914) 23 I. C. 828.

6. *Ajnasi v. Suraj*, (1877) 1 All. 501. See also *Bisweswara Ram v. Faltu Ram*, (1921) 59 I. C. 887.

instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court. (2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf. (3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time and the Court shall make such order approving or altering the draft, as it thinks fit. (4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force ; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered. (5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form namely :

Decree for
execution of
documents.

C. D., Judge of the Court of
(or as the case may be), for A. B., in a suit by E. F.
against A.B. ”

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same. (6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force, or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.”¹

1. C.P.C., O. 21, r. 24 (=Old Code, Ss. 261, 262.)

This rule authorises the registration of a document, be it optional or compulsory under the law of registration.¹ In the Muffusal, the presiding Judge executes the document, but the Registrar of a High Court may do it if empowered, but no covenant can be entered into on the judgment-debtor's behalf,² beyond that which may be expressed in the decree.

In a suit for a declaration that the plaintiffs are entitled to a half share in a certain number of shares in a Limited Company, the Court has no power to direct by its decree the Limited Company to register the plaintiff's name as share-holder but should instead direct the defendants to execute a transfer of a half of the share in suit in favour of the plaintiff and to lodge the transfer with the share-certificate with the company for registration. Such a decree is executable under Order 21 rule 34.³ In a suit to declare the plaintiff's right to property attached in execution of a decree against another person, a decree was passed on a compromise by which the defendant should execute a mortgage bond for the decreed amount and when the defendant failed to execute the bond within the time mentioned in the decree, it was held that the question what is the subject-matter of a suit must depend upon the facts of each case and in the present case the execution of the mortgage bond was a matter relating to the suit and having been directed by the decree was capable of being enforced under Order 21 rule 34.⁴ Where under a com-

1. See *Kanahia v. Kali Din*, (1879) 2 All. 392.

2. See *Ram Chunder v. Dwarkanath*, (1889) 16 Cal.330.

3. *Brojendra Kumar v. Kalinath*, (1917) 41 I.C. 77.

4. *Soudamini Dasi v. Behari Lal*, (1921) 25 C.W.N. 68 = 61 I.C. 535.

promise decree the defendant undertook to endorse certain promissory notes in the plaintiff's favour and on his failing to do so, the plaintiff instituted a suit for damages as the promissory notes had become barred, it was held that the proper course was to proceed under Order 21, rule 32 or 36 and that the suit was barred under Section 47¹ Where a decree provided for the execution of a conveyance of land, but not for the payment of money, and a portion of the land was taken away by the Government for railway purposes subsequently to the decree, it was held that the decree-holder must bring a separate suit to recover compensation money.² In a suit by a principal in a Court in British India against his agent, a British Indian subject residing within the jurisdiction of that Court, for a conveyance of property, purchased by the agent out of British India under circumstances in which he had to hold it for the benefit of the principal, the Courts of British India cannot avail themselves of the procedure provided under Order 21 rule 34 if the defendant disobeyed the order but can grant a mandatory injunction directing the agent to execute a conveyance under Order 21 rule 20 of the Code, but in the absence of any precept, the learned Judges declined to grant such an injunction.³

“(1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf and, if necessary by removing

Decree for possession of immoveable property.

1. *Alagappa v. Kanakasabai*, (1918) M.W.N.333 = 45 I.C. 689.

2. *Shumsoonvissa Begum v. Mirtunjoy Bose*, (1908) 18 W. R. 189.

3. *Ramasami v. Karuppan*, (1915) 29 M.L.J. 551 = 31 I.C. 216.

any person bound by the decree who refuses to vacate the property. (2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree. (3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any act necessary for putting the decree-holder in possession.”¹

“Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.”²

Where the plaintiff found it difficult to get execution of his decree which he secured in a suit for possession owing to the judgment-debtor having taken means of preventing identification of the land decreed and urged that the conduct of the defendant

1. C.P.C., O. 21, r. 35 (=Old Code, S. 263). For a full discussion of the proceedings in execution of a decree for possession, see pages 214-223 *supra* and Chapter on TERMINATION OF EXECUTION, *post*.

2. C.P.C., O. 21, r. 36 (=Old Code, S. 264).

was such as to put him to the necessity of proving where the boundaries were, it was said that, as the plaintiff could have prevented the confusion of the boundaries in the first instance by application to the Court to get the existing state of things properly defined, so as to prevent any future dispute, and, in the second instance, by at once executing his decree so as to take away the opportunity for making any change in the features of the land, the Court would refuse to throw on the defendant the onus of proving what was clearly for the plaintiff to prove. If, for the purpose of executing a decree for khas possession, it be necessary to remove any of the defendants against whom the decree was made from the land covered by the decree, the Court, on the decree-holder's application, may remove such person and deliver actual possession of the land to the plaintiff, but if the decree is silent as to a building on the land, the Court executing the decree cannot have the building pulled down.¹

Counterpart leases and other documents of the like kind, such as kabuliyats in India, ought to be regarded as accessory to the estate and to pass with it, whether the transfer is made by a conveyance, a decree, or a certificate of sale. This principle is applicable to the case of a decree giving possession of a village, so that the holders of such a decree would be entitled to the village account-books and other documents relating to its enjoyment and management. Further, such documents have generally no value or significance apart from the possession and enjoyment of the village or estate to which they relate. They are properly to be regarded, therefore,

1. *Radha Gobind Shaha v. Brijendro Coomar Roy Chowdhri*, (1872) 18 W. R. 527.

as accessory to the estate, and as claimable by him to whom it has been awarded, at least in so far they are necessary to his effectual and proper enjoyment of it.¹

Decree cannot
be split up.

Where the whole of a decree is perfect for execution, the decree-holder cannot be permitted to split it up as he pleases, taking out execution of a part of it at one time and another part of it at another time.² The right under a decree cannot be severed, so that the remedy against the person can remain in or pass to one, and the alternative remedy against the property to another.³ Where a decree for payment of money directed some defendants to pay the amount and in default directed the property in the hands of the other to be sold and where the decree-holder applied for execution against the person of the defendants, Karamat Hussain J. said that the decree was a money decree and as such was barred by S. 230 of the old Code and Chamier J. said that it was not so barred because a decree could not be split up when different reliefs were given against different defendants.⁴ A decree gave possession of lands and of certain zamindari papers, or in default of them a thousand rupees. The judgment-creditor went to the spot to get possession of the land as well as the papers and not having got the papers, his only course was to institute further execution proceedings either to get them, or the money made payable to him by the first decree in default. It was held,

1. *Shri Bhavani Devi v. Devrav Madhavrao*, (1887) 11 Bom. 485.

2. *Fatehchand v. Panna Lall Bania*, (1896) 10 C.P.L.R. 83.

3. *Padmanabha v. Thanakoti*, (1878) 2 Mad. 119.

4. *Parabhu Narain Singh v. Lalji Singh*, (1912) 9 A.L.J. 79 = 13 I.C. 187.

that, under these circumstances, this was not a splitting up of the decree.¹

But the provisions of Order 2, Rule 2, C. P. Code regarding omission of portions of claim do not apply to execution proceedings² or to applications for restitution, which are of a kindred nature.³ A person who holds a decree for possession and mesne profits may execute for these reliefs one after another;⁴ so an application for mesne profits for three years only subsequent to the suit is no bar to another application for a further period.⁵

The provisions of Order 23 are not applicable to execution proceedings.⁶ Where a suit is withdrawn against certain defendants with leave to institute a fresh suit and in execution the said defendants obstructed delivery, the decree-holder is precluded from proceeding with his application to remove the obstruction under Order 23, Rule 1.⁷ A proceeding under Order 21, Rule 90 is not a proceeding in execution and a compromise relating to it does not come under Section 47 or Order 21

1. *Wooma Churn Chowdhry v. Kumolay Kaminee Dabee*, (1876) 25 W.R. 58.

2. *Balasubramania v. Swarnammal*, (1915) 38 Mad. 199; *Radhakishen v. Radha Pershad*, (1891) 18 Cal. 515; *Sadho Saran v. Hawal Pande*, (1897) 19 All. 98; *Har Prasad v. Seth Radha Krishnan*, (1909) 2 I. C. 105; *Ibrahim v. Ghulam Hussain*, (1921) 15 S. L. R. 11=62 I. C. 507. See Vol. I, page 100.

3. See page 320 *supra*.

4. *Lingam Veeraraghava Rao v. Mallapragada Gurunatha Rao*, (1915) M. W. N. 793=30 I. C. 246.

5. *Balasubramania v. Swarnammal*, (1915) 38 Mad. 199.

6. *Mata Palat v. Beni Madho*, (1914) 36 All. 172; *Choudhry Ram Prasad v. Mahesh Kant*, (1922) 1 Pat. 232; *Lodd Govindass v. Ramdoss*, (1912) 24 M. L. J. 88=17 I. C. 752; *Banarsi Das v. Ramzan*, (1923) 72 I. C. 477.

7. *Biraik Beniamma v. Syed Shumsuddin*, (1911) 21 M. L. J. 404=8 I. C. 860.

Rule 2, but is covered by Order 23 Rule 3 and the Court has power to record or inquire into an alleged compromise entered into privately between the parties.¹

Applicability
of Or. 9.

The provisions of Order 9 C.P. Code do not apply to execution proceedings.² A Collector has no jurisdiction to restore an execution case to his file after it has been dismissed by him in default of the decree-holder. Subsequent proceedings in respect of the case in the Collector's Court are therefore void though the parties might submit to the Court.³ But the Court has inherent power to restore an application dismissed for default if sufficient grounds appear for the exercise of that power.⁴

Applicability
of Or. 22, r.
10.

The provisions of Order 22, Rule 10 are applicable to execution proceedings. In *Midnapur Zamindari Co., Ltd. v. Naresh Narain*,⁵ the Calcutta High Court held that the present Code (Order 21 Rule 12) seems to imply by the principle of exclusion that all the rules of that Order except rules 3, 4 and 8 are applicable to proceedings in execution of a decree or order and that rule 10 is so made applicable.

1. *Choudhury Jagadish Missir v. Choudhury Sureswar Missir*, (1921) 6 Pat, L. J. 253=62 I. C. 608.

2. See Vol. I, pages 97—100. *Hanswari Daso v. Radhika Prosad*, (1921) 63 I.C. 855 (So no appeal lies from an order refusing to restore an application dismissed for default); *Nageshwar v. Jai Narayan*, (1922) 73, I. C. 73; *Bhikam Khan v. Dan Singh*, (1923) 74 I. C. 7.

3. *Dalchand v. Narayan*, (1919) 51 I.C. 237.

4. *Gauri v. Hinga*, (1921) 23 3491=59 I.C. 595; also *Harlal v. Narayan*, (1921) 64 I. C. 421; *Shankarrao v. Manirao*, (1922) 68 I.C. 643; *Abdul Karim v. Choudhri Ram*, (1923) 69 I. C. 506; *Shanker Rao v. Manik Rao*, (1923) Nag. 18 (thereupon attachment revives).

5. (1912) 39 Cal. 220. See *Manmathanath v. Rakhal Chandra*, (1909) 14 C.W.N. 752=3 I. C. 324.

In Madras, this view was accepted in *Muthiah v. Govind Doss*,¹ Wallis and Spencer JJ. thought that proceedings in execution were but proceedings in suit and that consequently they came within the operation of the rule.

1. (1921) 44 Mad. 919 F.B. (Kumaraswami J. dissenting). See *Virupakshappa v. Shidappa*, (1902) 26 Bom. 109; *Shaik David v. Paramasami*, (1916) 31 M.L. J. 207=35 I.C. 70; *Mir Khan v. Sharfu*, (1923) 5 Lah. L. J, 163=74 I. C. 577.

CHAPTER XV

Arrest and Detention

Execution against person in Common Law—Writ of Ca. Sa.—Attachment and Committal—Arrest and detention in Indian law—Notice before arrest discretionary—Warrant for arrest—Valid and invalid writs—Procedure in arrest—Entry into dwelling house—Possession of warrant—Mole of arrest—Force in making arrest—Time of arrest—Dwelling house—Outer door—Breaking open door—Discretion in arrest—Escape—Retaking—Cancellation of arrest—Considerations in directing release—Effect of release—Release preliminary to relief in insolvency—Security—Detention in civil prison—Subsistence-allowance—Effect of detention—Exemption under agreement—Privileged persons—Women—Public officers—Ruling Princes—Ambassadors—Governors etc.—Legislators—Clergymen etc.—Judges—Parties—Counsel—Witnesses—Limits of privilege—Waiver of privilege—Application for discharge—Grounds of discharge.

Execution
against person
in Common
Law.

“At Common law, where the king was plaintiff in any action, whether for debt or damages, he had execution against the defendant both for body, land and goods. But where a common person was a party plaintiff, he was not entitled to arrest the defendant except in actions of trespass *vi et armis*. The common law, which is the preserver of the common peace of the land, did abhor all force as a capital enemy to it; and therefore against those who committed any force, the common law did subject their bodies to imprisonment, which is the higher execution, by which he loses the liberty till he agree with the party, and pay a fine to the king and therefore it is a rule in law, that, in all actions *vi et armis, capias* lies.”¹ It was not until the year 1503, that successive statutes enlarged the power of

1. *Harbert's Case*, 3 Co. 12 b. Freeman on EXECUTIONS, III. 2391.

arrest, in actions of debt, detinue and actions on the case.¹

In England, the writ of *capias ad satisfaciendum* usually called *ca. sa.* is meant "to take the execution-debtor, if he should be found in the bailiwick and him safely keep so that the sheriff may have his body before the High Court of Justice to satisfy the execution-creditor the amount payable under the judgment or order."²

Writ of Ca.
Sa.

Attachment and Committal are the two methods of enforcing a judgment or order of the Court by imprisoning the person to whom the judgment or order is addressed. Under the practice in existence before the passing of the Judicature Acts, Attachment was the correct method of enforcing a judgment or order which enjoined the performance of a given act, while Committal was the process by which one who had disobeyed a judgment or order of a negative character was punished.³ This distinction was removed by Order 42 rule 7 of rules of the Supreme Court which provides that "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal."

Attachment
and Com-
mittal.

In India, under the Code of Civil Procedure, decrees for payment of money, for injunction, for specific moveables, for specific performance, or for restitution of conjugal rights against a husband, are enforceable by arrest of the judgment-debtor and his detention in civil prison.⁴

Arrest and
detention in
Indian law.

1. See 52 Henry III. c. 23 ; 13 Edw. I. c. 11 ; 13 Edw. III. c. 17 ; 19 Henry VII. c. 9.

2. *Harvey v. Harvey*, (1884) 26 Ch. D. 644 (654).

3. Halsbury's Laws of England, XIV. 73.

4. See C.P.C., O. 21 rules, 30-32.

The distinction between attachment and commitment¹ viz., the former as a remedy for neglecting to do some act or deed, the latter for doing a prohibited act, is not maintained in India. The warrant authorises arrest and that is followed by detention in jail.

Notice before arrest, discretionary.

“(1) Where an application is made for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison. (2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.”²

The notice issued under this rule must call upon the judgment-debtor to show cause why he should not be committed to jail in execution. Unless protection has been granted, the power of the Court to issue a notice or a warrant of arrest is not affected by an application by the judgment-debtor in insolvency.³ Residence of the debtor outside the jurisdiction is no reason for refusing to issue a warrant, though it can be executed only within such jurisdiction.⁴

1. See *Callow v. Young*, 50 L. T. 147.

2. C.P.C., O. 21 r. 37 (=Old Code, S. 245).

3. *Ganpat v. Mahadev*, (1897) 22 Bom. 731; *Bhaskar v. Shudhar*, (1904) 9 Bom. L.R. 898; *Dipchand v. Sheikh*, (1911) 14 O. C. 36=9 I. C. 746.

4. *Krishna Prasad v. Bidyananda*, (1918) 3 Pat. L.J. 95=44 I.C. 296. Section 136 C.P. Code which provides for arrest and attachment outside jurisdiction does not apply to execution proceedings.

“Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.”¹

Warrant of arrest.

“Warrants in blank are absolutely void. A warrant must not be issued in blank with a view of later writing in the name of the defendant. A warrant issued in a general way against any one of a certain class of persons is void. A warrant may be valid although it does not contain the name of the person whose arrest is directed. But for want of the true name of such person there must be such sufficient description of him in the warrant that he may be identified therefrom ; as, for example, stating his occupation, his personal appearance, and peculiarities, the place of his residence or other circumstances of identification. When a warrant gives a fictitious name without stating that the name is fictitious, and that the true name is unknown, and follows with a description of the person, the officer must rely on the name alone, and cannot justify the arrest of a party whose name is other than that appearing in the warrant, even though he is the party described and intended. As where a warrant was issued against ‘John Dol, the person carrying off the cannon’, the arrest of Levi Mead is not justifiable, although he was taken in the act of carrying off the cannon and was the person intended. It is never sufficient that the party intended to be arrested was the person actually arrested. The warrant must so describe the party

Valid and invalid writs.

1. C.P.C., O. 21 r. 38 (=Old Code, S. 337).

arrested that he may know whether he is bound to submit. So where the complaint was against John R. Miller, and the warrant commanded the arrest of "the said William Miller," the officer was not justified in arresting John R. Miller, although it was proved that he was the person intended. But where a person is known by two names, and equally well by either, a warrant may command his arrest, under either name, even though it be a wrong one."¹

If the sheriff having two writs, one invalid and the other valid, arrests on both the writs, he may rely on the valid writ and treat as detainers any number of valid writs that may afterwards come to his hands.² If he arrests under the invalid writ alone, he cannot afterwards justify by the good one.³ Nor can he, while a person is unlawfully in his custody by arrest under an invalid writ, arrest that person on a good writ.⁴ While however a party has been illegally arrested there is no objection to the sheriff taking him in execution while in custody on a writ that has been since placed in his hands by an individual unconnected with the former proceedings.⁵ A person brought under an extradition warrant and acquitted of the offence laid against him may, before he has had an opportunity of leaving the Court, be arrested under a writ of attachment, unless the extradition warrant was procured with the object of facilitating its execution.⁶

1. Voorhee's LAW OF ARREST, 25-27; *Shadgett v. Clipson*, 8 East 328; *Cale v. Hindson*, 6 T.R. 234.

2. *Hooper v. Lane*, 6 H. L. 443.

3. *Hooper v. Lane*, 6 H. L. 443; *Ex parte Freston*, 30 L. J. Ch. 400; *Hawkins v. Hall*, 3 Jur. 283. See however *Barrack v. Newton*, 1 Q. B. 525.

4. *Hooper v. Lane*, 6 H. L. 443.

5. *Egginton's case*, 18 Jur. 958.

6. *Stein v. Valkenhuisen*, 27 L. J. Q. B. 236.

“ A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained. Procedure in arrest.

Provided, firstly, that for the purpose of making an arrest under this section, no dwelling house shall be entered after sunset and before sunrise : Entry into dwelling houses.

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested,

is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.”¹

Possession of
warrant.

“The officer making an arrest must have the warrant in his possession at the time of making the arrest,² whether the person taken demands inspection of it or not, though the person arrested knew that a warrant had been issued for his arrest. There is no such thing as constructive possession of a warrant. But where a sheriff is armed with a warrant, his deputy may make an arrest within the sight or hearing of the superior officer, although the warrant is not in his actual possession. A person about to be arrested is entitled to know that he is arrested by lawful authority and after being appraised of the lawful authority, if he submits to the arrest, he has a right to know the grounds on which he is arrested. But a person resisting arrest is not entitled to see the warrant or know its contents so long as he resists, and whether he resists or not, if he has actual notice of the lawful authority by which he is arrested, the officer is not obliged to show or read his warrant. An officer is not required in any case to part with the warrant from his possession, for that is his justification. Nor is he bound to exhibit it where there is reason to apprehend that it will be lost or destroyed. He must however in some way inform the party that he has a warrant and comes as an officer to execute it and not as a wrong-doer. The only effect of the omission of the officer to declare his authority or to show his

1. C.P.C., S. 55 cl. (1) (= Old Code, s. 336).

2. *Emp. v. Amarnath*, (1883) 5 All. 318. See Code of Criminal Procedure, (Act V of 1898), Ss. 75-86.

warrant where it is his duty to show it is to deprive him of the protection which the law throws around its ministers when in the rightful discharge of their official duty. When the officer is generally well-known within his own jurisdiction or when the officer exhibits the badge of his office, there is notice of authority. In no case is an officer obliged to show his warrant to any person other than the party arrested, nor to him except on request. Mere resistance of legal arrest is a crime, because it involves an assault upon the officer. A person illegally arrested may use such force as is necessary to regain his liberty. A charge of resisting cannot be sustained unless the officer resisted was authorised by law to make the arrest at the time and place where the arrest was attempted. If the arrest was by warrant, the process must have been valid on its face and issued from a Court of competent jurisdiction. Where the arrest of the wrong person is attempted, the arrest may be resisted.”¹

“To arrest is to deprive a person of his liberty by legal authority. It is the seizing a person and detaining him in the custody of the law. To complete an arrest there must be a taking into custody, either by touching the defendant for the purpose of arresting him, which purpose must be brought to the knowledge of the defendant, or by his submission to words of arrest with the knowledge that he is being arrested. The arrest is complete when the officer having authority to arrest lays his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him. The arresting hand may be that of an assistant or follower but the officer ought to be so near as to

Mode of
arrest.

1. Voorhee's LAW OF ARREST, 29, 47--51.

be considered as acting in it. Mere reading of the warrant to the accused does not make an arrest. But where an officer went to the accused with a warrant and finding her sick in bed, read it to her and told her that if she did not give a bond, he 'would haul her to jail', it was held that there was arrest, though he did not touch her or exercise any physical control over her. Until the act of taking into custody is consummated, there can neither be a criminal rescue of the prisoner nor a criminal escape by him. An action of false imprisonment will not lie against the arresting party until all the acts necessary for a legal arrest have been consummated. If an officer assumes control over the person of the defendant, as where when in a room with the accused he locks the door, and tells him that he is a prisoner, then no submission or touching is necessary, for the defendant has been completely taken into the custody of the law. Bare words will not make an arrest, if the defendant resists the arrest. In such case there must be an actual touching of the person of the defendant and in all cases there must be a restraint of the person, a taking into custody. Where an officer had a warrant against the accused and went upon his premises, saying 'I arrest you' the accused with a fork in his hand prevented the officer touching him, and retreated from the officer's presence, it was held not to be an arrest, because there was no submission or restraint."¹

1. Voorhee's LAW OF ARREST, 39-41.

"An arrest must be made by the authority but it need not be made by the hand of the officer. It is usually made by touching the defendant and informing him that he is a prisoner. But touching is not indispensable. Neither can an arrest be made by the mere words of the officer. It is sufficient however that the officer has the defendant

“An officer whose duty it is to make an arrest may use all force that is necessary in making the arrest, even to the point of taking life, when there is no other way of making the arrest and it makes no difference whether the process is civil or criminal. But it is his duty to use no unnecessary harshness or violence and if he uses more force than is absolutely necessary, he will be liable civilly and criminally. The same rule applies to preventing an escape. An officer is not justified in striking one with his club, who interferes with him in the performance of his duty, although he would be justified in placing him under arrest. An officer who has arrested a defendant in a civil suit has no right to handcuff him unless it is reasonably necessary or he has attempted to escape. And without some good reason, a prisoner must not be brought shackled into Court. The right to handcuff depends on the circumstances of each case considering the conduct and temper of the person in custody.”¹

Force in
making arrest.

A judgment-debtor may be arrested at any

where he can exercise control over him, that he assumes to exercise such control and that the defendant acquiesces and submits himself to the officer's authority. If after a defendant is legally in custody, the officer received another *capias ad satisfaciendum* against him, he need not make any new arrest. An arrest under the writ operates as a constructive arrest under all other writs that may come to the same officer's hands against the same defendant, provided that the first arrest is legal. If illegal, it does not dispense with the necessity for arrests under subsequent writs.”—Freeman on EXECUTIONS, III. 2438,

“A person is arrested by placing a hand upon the party and saying that he is arrested, there being no necessity to show the warrant, or to state at whose suit the arrest is made unless upon a demand by the party in default. If the officer has two warrants in his pocket, and does not say upon which he arrests the person, an arrest is deemed to have been made on both.”—Comyn's Dig. tit. Execution.

1. Voorhee's LAW OF ARREST, 105—112.

Time of
arrest.

hour and on any day. Sundays and holidays are not excepted. The prohibition of arrest enacted by the Lord's Day Act¹ in England does not apply to India.²

Dwelling
house.

"A dwelling house is a building occupied by man, a house usually occupied by the person there residing and his family. The use to which a house is put at the time in question determines its character. A barn may be converted as a dwelling house and *vice versa*. A house merely designed as a dwelling house but not occupied for that purpose is not a dwelling house. If part of a building is used as a place of abode, every part of the building to which there is an internal communication from the part used as a dwelling is part of the dwelling house. Thus, the loft of a coachhouse and stable which is used as the dwelling of a coachman is his dwelling house, although the principal use of the building is that of a coachhouse and stable. Where a building is leased to different persons in different apartments each apartment is the dwelling house of the lessee. A suite of rooms in a college is a dwelling house. So is a public jail or an infirmary. And a building thirty-six feet distant from the main dwelling in which the servants sleep is a part of the dwelling house.

"When a place is used as dwelling as well as for business, it will be a dwelling house as a whole, whether the dwelling-portion is identical with that of business or they are in different parts of the same building, but connected with each other. In order to make it a dwelling house, the house must be the

1. 29 Car. II. c. 7.

2. . Anon. (1869) 4 M. H. C. R. 62, *Sheoram v. Thakur Prasad*, (1908) 30 All. 136.

usual and habitual place for sleeping purposes by the owner, or some member of his family, or his servants. If the person who sleeps in a store house is not the owner or one of his family, or a servant or a clerk, but is employed to sleep there solely for watch, it is not a dwelling house. A house used occasionally only and slept in for a few days is a dwelling house only for such period. But a dwelling house will not lose its character, owing to temporary absence when there is an intention of return.

“ Law regards a man’s house as his castle, his place of refuge, his sanctuary, not only because of the natural right, but because of the fear of breach of peace. A dwelling house cannot be forced by an officer in the execution of civil process against the occupier or any of his family who have their domicile or ordinary residence there : and this immunity from arrest extends not only to the occupant, his wife and children, but to domestic servants, and permanent boarders and lodgers as well, but not to strangers or visitors. So that if a stranger whose ordinary residence is elsewhere upon a pursuit, take refuge in the house of another, the house is not *his* castle : and the officer may break open the doors or windows in order to execute his process. If the occupant should refuse admission to the officer *after his purpose and authority were made known*, the law would consider him as conspiring with the party pursued to screen him from arrest and would not allow him to make his house a place of refuge.

“ Where there are two doors to the cellar-way of a dwelling house, one opening outwardly and the other opening into the cellar, the latter is the outer door of the house and if closed and latched, the unlatching and entering is a breaking. Upon like

Outer door

reasoning the storm-door is not the outer door of a house. To gain an entrance by deception, as where the officer announced that he had a note for the party whose arrest was sought or that he wanted to see some other person in the house and thereby gained admission, have been held legal entrances.

“ Inner door is not protected except when it is the entrance to a distinct apartment or to the outer door or windows of other buildings not the dwelling of the debtor. Where a house is let to lodgers, the owner retaining one room thereof for himself, an officer may break open an inner door which leads to the owner’s room for the purpose of arresting him. But if the whole house be let in lodgings, as each lodging is then considered a dwelling house, in which burglary may be stated to have been committed, it has been supposed that the door of each apartment would be considered an outer door which could not be legally broken open to execute a civil arrest. But if the occupier of a house were arrested outside his house and then fled into the house for protection, the officer can pursue and break into the house, for he would not then be effecting an arrest, but would be preventing an escape. Similarly if one is arrested by the officer touching him for the purpose of arresting him through a broken window, the officer may break an outer door, because he had already completed the arrest, but wants only to remove his prisoner.¹ As early as 1605, it was decided that the householder must be requested to open the door before the officer can break his way in and such is still the law.² If the officer has once been in the house lawfully in exe-

1. Voorhee’s LAW OF ARREST, 92-98.

2. *Semayne v. Gresham*, 5 Coke 91.

cuting the processs, he may re-enter, using as much force as is necessary.¹ So where an officer obtained a peaceable entrance through an outer door, and before he could make an arrest, was forcibly ejected from the house, and the door fastened against him, he was justified in forcing open the door, without a demand of re-admittance, and making the arrest.² An arrest of a person in a civil action, by an unlawful breaking not only subjects the officer to a civil action for the trespass but the arrest is altogether void."³

The breaking of the outer door in civil process will be the same as what would be so in burglary. Breaking does not mean that any part of the material used in the construction of a door or window, or any other part of the house must be actually broken or even injured. If anything material which constitutes a part of the dwelling house and is relied on as a security against intrusion, be broken, removed or put aside, there is a breaking.⁴

Breaking
outer door.

The sheriff is not entitled to enter the house of a third party, even though the outer door be opened and he has reasonable ground for believing that the person in default is within, unless such person is in fact inside the house,⁵ and he is justified in breaking the doors in the same event.

Where a person in default is afflicted with an illness of so serious a character that his removal to

Discretion in
arrest.

1. *Genner v. Sparks*, 6 Madd. 173.

2. *Aga Kurhboolie Mahomed v. Reg.*, 3 Moore P. C. 164.

3. *Kerbey v. Denbey*, 1 M. L. W. 336.

4. *Rex v. Backhouse*, Lofit. 61.

5. *Morrish v. Murray*, 13 L. J. Exch. 201 ; *Johnson v. Leigh*, 1 Marsh 565.

goal would endanger his life and he remains in the same condition up to the time of the return of the writ, the sheriff is justified in not arresting him.¹ He must nevertheless keep him in custody, even after he has returned the writ,² unless he is insane and confined in a lunatic asylum.³

Escape.

"It is the officer's duty on making an arrest to keep the prisoner within his custody until he is lawfully committed, discharged or admitted to bail by order of the Court. Escape is departure of a prisoner from custody before he is discharged by due process of law. Should the officer by his willingness or negligence allow the prisoner to escape from his custody, he is liable. When a person arrested a defendant on a warrant and left him on his promise to follow him, if the person escapes or is arrested on a criminal process, so that he cannot retake him, the officer is liable for the escape. There can be no escape from custody where the arrest was made by a void warrant or where the act of taking into custody did not in itself amount to an arrest. An officer may arrest a person who has escaped from custody on the same warrant. If an officer makes an illegal arrest and then accepts a bribe from his prisoner to allow him to escape, he is guilty of bribery notwithstanding the arrest was illegal."⁴

Retaking.

A person having been once arrested may be retaken under the same writ, when he had escaped, when he has been discharged on the ground that

1. *Perkins v. Meacher*, 1 Dowl. P. C. 21; *Cavenagh v. Collett*, 4 B. & Al. 279.

2. *Baker v. Davenport*, 8 D. & R. 606; *Jones v. Robinson*, 12 L. J. Exch. 415.

3. *Cavenagh v. Collett*, 4 B. & Al. 279.

4. *Voorhee's LAW OF ARREST*, 52-55.

he was arrested without a warrant,¹ or that he was privileged from arrest,² or that he was misnamed,³ but not where he has been discharged after having been once regularly taken.⁴

The executing officer is only empowered to arrest the defendant and detain him for such a reasonable time as is sufficient to allow of his being brought before the Court and having an opportunity of applying for his discharge. The detention of a defendant after such reasonable time and without further authority of law is illegal.⁵ So where a sheriff's officer took a prisoner in custody under a warrant directed to the superintendent of the Penitentiary Jail to the Alipore Jail and delivered her there, it was held that she was entitled to her discharge.⁶ The date of the return of the warrant must be fixed.⁷

“(1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness. Cancellation of arrest.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been com-

1. *Plomer v. Ball*, 5 A. & E. 823.

2. *Reynolds v. Newton*, 1 Q.B. 525; *Andrews v. Walton*, 1 Mac. & G. 380; *Philips v. Price*, 1 D. & L. 110.

3. *Reg. v. Burgess*, 2 Jur. 396.

4. *Mackie v. Warren*, 5 Bing. 176.

5. *In re Shambhoo Chander*, (1865) Bourke 59.

6. *Shamsunnessa v. Anne Love*, (1885) 11 Cal. 527.

7. *Krishna Prasad v. Bidyananda*, (1918) 3 Pat. L.J. 95=44 I.C. 296.

Considerations in directing release.

mitted to the civil prison, he may be released therefrom—

- (a) by the Local Government, on the ground of the existence of any infectious or contagious disease, or
- (b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under these provisions may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58."¹

"(1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;
- (b) the transfer, concealment or removal by

1. C.P.C., S. 59 (= Old Code, S. 653 cl. 3 and 4).

the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;

- (c) any undue preference given by the judgment-debtor to any of his other creditors ;
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;
- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order cancelling the arrest [under sub-rule (1)], it shall cause the judgment-debtor to be arrested if he has not

already been arrested and, subject to the other provisions of the Code, commit him to the civil prison."¹

The power not to order the arrest of the judgment-debtor is discretionary on good cause shown, but if no good cause is shown, the judgment-debtor must be arrested at once.² Lunacy of the judgment-debtor is a good ground,³ though he is not exempt.⁴ The inquiry contemplated by this section may be made even before ordering arrest.⁵ An appeal lies against an order granting an application for a release under the rule.⁶

The judgment-debtor has to satisfy the Court that he is unable to pay the amount of the decree from poverty or other sufficient cause. The presumption is that the judgment-debtor has not contracted his debts without the means of paying them and therefore if no evidence was given at all on either side, the judgment-debtor fails in his claim for exemption from the consequence of his own act.⁷ Ordinarily, if for a number of years a decree-holder though actively trying to execute his decree fails however owing to the obstruction and bad faith of the judgment-debtor, there will be good ground for ordering arrest. But in case of no bad faith in the conduct of the judgment-debtor, the Court should grant the judgment-debtor a reasonable time within which to pay the money and if within this time,

1. C.P.C., O. 21, r. 40 (=Old Code, 337 A).

2. *Gubby v. Ramdoyal*, (1897) 2 C.W. N. 588.

3. *Bhanabhai v. Cholabhai*, (1897) 23 Bom. 961.

4. *Nutt v. Verney*, 4 T.R. 121; *Steel v. Alan*, 2 B. & P. 362.

5. *Dipchand v. Naushadali*, (1911) 14 O.C.36=9 I.C. 746.

6. *Abdul Rahiman v. Mahomed*, (1897) 21 Mad. 29; *Raj Karni v. Karm Ilahi*, (1919) 1 Lab. 77.

7. *Bhaimia v. Kadir*, U.B.R. (1897—1901) II. 279; *Chas. R. Cowie & Co., v. Skidmore*, (1914) 7 Bur. L.T. 242=23 I.C. 833.

the judgment-debtor shows negligence and has not proceeded with necessary vigor, the question whether or not he deserves arrest must be re-considered.¹ Where all the properties of a judgment-debtor have been sold in execution of decrees obtained by other persons and he is not able to pay off the decree-debt, it may not be proper to order his imprisonment.²

“Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

Release preliminary to relief in insolvency.

Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.”³

It is the duty of the Court to inform the judgment-debtor that he may apply to be declared an insolvent. But omission to inform will not vitiate

1. *Bishen Das v. Jiwa Ram*, (1911) P.W.R. 153=11 I.C. 848. See also *Bahadur v. Virod*, (1915) P.W.R. 93=29 I.C. 152.

2. *Lala Das v. Minamal*, (1922) 4 Lah. L.J. 266.

3. C.P.C., S. 55 (3) & (4) (=Old Code S. 326). See Vol. I. 603 and *FIRM OF Shiv Dayal Ram v. Mahomed Khan*, (1924) 6 Lah. L.J. 200; *Dharam Singh v. Nand Singh*, (1924) 78 I.C. 447; *Shyam Prosonno Katari v. Keshab Chandra*, (1924) 5 Pat. L.T. 336.

further proceedings.¹ So long as the judgment-debtor is before the Court pending its orders, this rule will apply ; when once he is committed to jail, he can be released only on an application under the Insolvency Acts² or under the provisions of Section 58 C. P. Code³

When a judgment-debtor brought before the Court under arrest in execution claims to be discharged on the ground that he intends to apply to the Court to be declared an insolvent, he is not entitled to be discharged on complying with the provisions of this rule,⁴ but the Court has a discretion. In respect of an unscheduled debt, he will be liable for arrest, though he has taken the benefit of insolvency and is still undischarged.⁵ If a judgment-debtor released on security to apply to be declared an insolvent within one month fails so to apply and is not arrested again, it is still open to him to apply at a subsequent date.⁶

When an application of a judgment-debtor to be declared an insolvent has once been dismissed and he is re-arrested in execution of the decree against him, he is not entitled to a release under this section (55) on expressing his willingness to apply again to be declared insolvent, so long as the bar of the previous dismissal is not removed by obtaining

1. *Arjan Singh v. Gaman*, (1905) P.R. 75.

2. Provincial Insolvency Act, (V of 1920) ; Presidency Towns Insolvency Act, (III of 1909). See *In re William Hastie*, (1885) 11 Cal. 451.

3. *In re Quarme*, (1885) 8 Mad. 503 ; See *Mahomed v. Radhi*, (1887) 12 Bom. 46.

4. The words 'shall' and 'will' in s. 55, cl. 3 and 4 were replaced by 'may' by Act III of 1921. Under the old law the release was obligatory, *Ex parte Pinsent*, (1885) 8 Mad. 276.

5. *Panna Lall v. Kanhaiya*, (1888) 16 Cal. 85.

6. *Alagappa v. Sarathambal*, (1902) 25 Mad. 724.

leave of the Court under rule 11 of the rules framed in Sind under the Insolvency Act, for, to allow a fresh application without such leave would result in an abuse of the process of the Court contrary to the provisions of S. 157 of C.P. Code.¹

The pendency of insolvency proceedings does not take away from the executing Court, the power of committing the judgment-debtor to jail, for, prior to adjudication, a decree-holder has the right to proceed against the person and property of his judgment-debtor. The object of the provision of Section 55 (3) is to give the debtor time to apply, but if he has already done so and proceedings are going on, there would be no meaning in giving further time.²

“The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of the judgment-debtors.”³

Subsistence-allowance.

“(1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) When a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales

1. *Abdul Jabar v. Sheikh Karim*, (1911) 9 I.C. 121.

2. *Kishan Chand v. E. D. Sassoon*, (1910) P. W. R. 83=7 I.C. 551.

3. C. P. C., S. 57 (=Old Code, S. 338). For a list of rules, see Rules and Orders, Madras (I. 195) Burma, 115 and N. W. P. 113.

have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit. Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed."¹

The Court must fix the monthly allowance payable during detention and the sum so fixed must be paid in advance before the first day of each month.² The officer and not the prisoner has to see that the money is paid.³

Where subsistence allowance was sent by money order but the money order did not reach the officer in time, there was an omission to pay within the meaning of Section 58 and a debtor released is not liable to be re-arrested under the same decree. There is no payment to the officer until it actually reaches him.⁴

1. C. P. C., O. 21 r. 39 (= Old Code, Ss. 339-40.)

2. *Dutt v. Cornelius*, (1870) 5 B. L. R. Ap. 79; *Haladhar v. Ambikacharan*, (1870) 5 B. L. R. Ap. 80.

3. *In re Thomson*, (1865) Bourke 421.

4. *Arukasthanath v. Pasambath*, (1913) 22 I. C. 25.

(1) " Every person detained in the civil prison in execution of a decree shall be so detained— Detention in civil prison.

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(b) in any other case for a period of six weeks,

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance :

Provided also, that he shall not be released from such detention under clause (ii) or clause (iii) without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison."¹

The immunity of the judgment-debtor from a second arrest for the same decree-debt depends on actual detention in jail under the first arrest and a

1. C. P. C., S. 58 (=Old Code Ss. 341-2.)

release from such detention.¹ When the judgment-debtor, while acting as a pleader in Court was arrested but discharged as being exempted from arrest under S. 642 of the old Code (now S. 135), he was liable to be re-arrested in the execution of the same decree;² so when the judgment-debtor was arrested but released owing to the non-payment of the subsistence money even after the warrant of committal was made out he was liable for re-arrest under the same decree.³ This section does not apply to cases of imprisonment for contempt of Court.⁴

Where a judgment-debtor is arrested and committed to jail and applies for insolvency and protection, an interim protection may be ordered and he may be released from jail. If application for further protection is refused, is he liable for re-arrest under the same decree? According to the High Court of Calcutta the detention and discharge from jail operate to put an end to the remedy by arrest under the same decree once for all,⁵ but according to the High Courts of Bombay and Allahabad the only cases in which a judgment-debtor is exempt from a fresh arrest are those specified in the C. P. Code and the order of the Insolvency Court granting interim protection is not one of them.⁶

1. *Chengalraya v. Subbiah*, (1871) 6 M. H. C. R. 84; *Subba v. Venkata*, (1884) 8 Mad. 21.

2. *Rajendro Narain v. Chunder Mohan*, (1896) 23 Cal. 128; *Somasundaram v. Maung Ba*, U.B.R. (1897—1901), II. 281.

3. *Habibul v. Ramsahai*, (1904) 26 All. 317; *Timapa v. Maneshwar*, (1884) 9 Bom. 181.

4. *Martin v. Lawrence*, (1879) 4 Cal. 655.

5. *Secretary of State v. Judah*, (1886) 12 Cal. 652; *In the matter of Boyle Chand*, (1893) 20 Cal. 874.

6. *Shamji v. Poonja*, (1902) 26 Bom. 652; *Suraj Din v. Mahabir*, (1910) 33 All. 279. See Freeman on EXECUTIONS, III. 2453.

The judge has no power to fix a term of imprisonment at his discretion within the maximum,¹ and if none of the conditions mentioned in the proviso are fulfilled, the judgment-debtor must remain in jail for the full time.² When a judgment-debtor is arrested before judgment under the provisions of S. 481 of the old Code (now O. 38, r. 4) and the period of detention provided by that section terminates while the defendant is still detained in jail, the period of prior imprisonment will be taken into account in calculating the total duration of imprisonment if he is rearrested after decree and when that period and the new period amount altogether to six months the defendant must be liberated.³

The imprisonment does not operate as a satisfaction of the decree debt, but only as a release of the person from execution. The judgment-debtor may be adjudicated an insolvent on the strength of the debt,⁴ and his property may be taken in execution of the decree.⁵ When a decree is payable in instalments, the debtor cannot be imprisoned afresh for default of payment of each instalment.⁶

A provision in a promissory note exempting the body of the maker from arrest in the enforcement of his liability was held effective in America,⁷ and there is nothing in Indian Law against agreements excluding the personal liability of a contracting party.

1. *Subudhi v. Surji*, (1889) 13 Mad. 141.

2. *Surjan v. Sagai*, (1900) 5 C.W.N. 145.

3. *Ghanasam v. Joharimall*, (1883) 7 Bom. 431; *Khoda v. Shukroolah*, (1873) 5 N.W.P. 220 (may be continuous or broken intervals).

4. *In the matter of Raghubhai*, (1869) 6 B.H.C.R. 30.

5. *Janaki Singh v. Kaloo*, (1868) 9 W.R. 181 F.B.

6. *Damodar v. Mulhari*, (1882) 7 Bom. 106.

7. Freeman on EXECUTIONS, III. 2515.

Privilege of Women.

“No Court shall order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.”¹ Women are therefore not protected from arrest and detention in jail in execution of decrees other than those for money, such as decrees for injunction² or in any case in which the arrest of women is not prohibited by the C. P. Code. In execution of a decree against a wife for restitution of conjugal rights, no right to arrest the wife now exists.³

Privilege of public officers.

“In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity (a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and (b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.”⁴

Exemption on public grounds.

“The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf.”⁵

Privilege of princes, &c.

“No Prince, Ruling Chief whether in subordinate alliance with the British Government or otherwise and any ambassador or envoy of a foreign

1. C.P.C., S. 56 (=Old Code, S. 245). If arrested wrongly the woman must be released; *In re Radhi*, (1887) 12 Bom. 228.

2. C.P.C., S. 132 (2) (=Old Code, S. 640).

3. C.P.C., O. 21, r. 32 (=Old Code, S. 260).

4. C.P.C., S. 81, (Old Code Ss. 427, 428). See also O. 27, r. 8, and Vol. I, 553.

5. C.P.C., S. 55(2).

State shall be arrested under the Civil Procedure Code, and except with the consent of the Governor-General in Council certified by the signature of a Secretary to the Government of India no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy."¹

The Maharaja of Hill Tipperah,² Desai of Pattadi,³ Jamadar of Shihr,⁴ and Jagirdar of Kurundivard⁵ are Ruling Chiefs. Where objection on the ground of want of sanction is taken and the decree-holder applies for sanction, the Court should stay proceedings.⁶

Where an ambassador is protected, the protection extends to his secretary, attendants, retinue, couriers and domestic servants,⁷ but not to the wife of a secretary.⁸ Consul-generals are exempt but consuls are not, they being commercial agents owing a temporary allegiance to the State and not diplomatic agents owing no allegiance to the State.⁹ A foreign minister cannot waive his privi-

Privilege of ambassadors.

1. C.P.C., S. 86 (3) (=Old Code S. 433)). For notifications of Government see Statutory Rules and Orders, I. 625-38). See Diplomatic Privileges Act, 1708 (7 Anne c. 12), Halsbury's Laws of England, I. 18 and VI. 423 and Harrison's Digest (1756--1843) 356; and Vol. I. 554-8.

2. *Beer Chunder v. Raj Coomar Nobadeep*, (1883) 9 Cal. 535. See also *Birehunder v. Ishan Chander*, (1878) 3 C. L. R. 417; *Ramnath v. Sri Thakur Rask Behari*, (1914) 25 I. C. 271; *Maharaja of Bharatpur v. Kachera*, (1897) 19 All. 510. As to Raja of Cherrapoonjee, See *Hajon v. Bur Singh*, (1884) 11 Cal. 17.

3. *Kambhai v. Himatsanji*, (1884) 8 Bom. 415.

4. *Chandu Lal v. Awad*, (1896) 21 Bom. 351 (355).

5. *Krishnaji v. Secretary of State*, (1918) 21 Bom. L.R. 376 = 57 I.C. 228.

6. *Amir Singh v. Jagatjit Singh*, (1920) 58 I.C. 912.

7. *Lucknow v. Coysgarne*, 3 Burr. 1676,

8. *English v. Cabarello*, 3 D. & R. 25.

9. *Marshall v. Critico*, 9 East 447, but *contra* in United States.

lege, because it is that of his sovereign; and an attache to a foreign legation is a minister.¹

Exemption of
Governors,
&c.

(1) "The Governor-General, each Governor, and each of the members of their respective Councils, shall not

(a) be subject to the original jurisdiction of any High Court by reason of anything, counselled, ordered, or done by any of them in his public capacity only, nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction; nor

(c) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the Chief Justices and other Judges of the several High Courts."²

In America, Members of Congress, and State Legislators, while attending their respective assemblies or going to or returning from the same are protected, but a person who has been newly elected but who has not yet taken his seat is not.³ A similar rule will apply in India, as otherwise public interests will suffer.

Privilege of
clergymen
etc.

"Clergymen while performing divine service, or going to or returning from the performance of such service on any day of the week; military men

1. See Voorhee's LAW OF ARREST, 151.

2. Government of India Act, 1915 (5 and 6 Geo. V c. 61), s. 110.
See Ilbert's Government of India, 275-6.

3. Freeman on EXECUTIONS III. 2430.

on military duty, except commissioned officers under certain circumstances; electors while attending or going to or returning from a public election; jurors attending court; sheriffs and other peace officers while actually engaged in the performance of their duties but not at other times, except by statute," are exempted by the Law of England.¹

"No Judge, Magistrate or other Judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from his Court. Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than a process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal."²

Privilege of Judges.

The provision is inapplicable to the Court of Small Causes in the Presidency-town and in such case the principles of English law are applied.³

Parties to an action are privileged, though represented by solicitors.⁴ The privilege can be claimed in respect of proceedings⁵ before a judge in cham-

Privilege of parties to action.

1. See Voorhee's LAW OF ARREST, 152—3.

For privileges of soldiers, seamen and marines, see 44 and 45 Vic. c. 58, s. 144, 29 and 30 Vic. c. 109, s. 97 and of Ministers of religion, see 24 and 25 Vic. c. 100.

2. C.P.C., S. 135 (= Old Code, S. 642).

3. *In the matter of Soorendranath*, (1880) 5 Cal. 106.

4. *Persse v. Persse*, 5 H.L.C. 671; *Spence v. Stuart*, 3 East 89; *Newton v. Askew*, 5 Hare 319.

5. *Ex parte Parker*, Ves. 554; *Ex parte Russel*, 19 Ves. 163; *Eyre v. Barrow*, 27 L.J. Ch. 784.

bers,¹ a registrar,² taxing master³ or before arbitrator.⁴ A defendant who appears in Court to defend his suit is exempt from arrest. A surety for the appearance of the defendant cannot therefore claim to initiate proceedings under Order 38 rule 3 of the Code with a view to obtain his discharge when the defendant appears in Court to defend his suit. Nor does the appearance of the defendant on that occasion amount to a "voluntary surrender" within the meaning of that rule.⁵ A person discharged out of custody cannot be taken prisoner during his journey home.⁶ Where a defendant in a suit in the High Court was arrested in execution of a decree of the Calcutta Court of Small causes while attending before an arbitrator appointed by the High Court on a reference in the suit, it was held that he was then privileged from such arrest and that the High Court had power to direct his release from custody.⁷ A party to a suit even though he is only a defendant in a suit instituted under the summary procedure of the C.P. Code and has not obtained leave to defend, is entitled to the privilege of exemption from arrest upon civil process both on his way to and return from the place of trial.⁸ Where an insolvent who was wrongly arrested was discharged by the commissioner but was immediately re-arrested on a warrant obtained by the judgment-creditor he was not protected from

1. *Re Jewitt*, 33 Beav. 559.

2. *Newton v. Askew*, 6 Hare 319.

3. *Eyre v. Barrow*, 27 L.J. Ch. 784.

4. *Spence v. Stuart*, 3 East 89; *Ex parte Temple*, 2 F.B. 395; *Webb v. Taylor*, 13 L.J. Q.B. 24.

5. *Odayamangalath Appanni Nair v. Isack Mackadan*, (1919) 43 Mad. 272.

6. *Hawkins v. Hall*, 3 Jur. 282; *Reg. v. Burgess*, 3 N. & P. 366. See also *Ardeshirji v. Kalyandas*, (1909) 32 All. 3.

7. *In re Juggessur Roy*, (1879) 5 C.L.R. 170.

8. *In the matter of Soorendro Nath*, (1879) 5 Cal. 106.

arrest as being on his way back from Court.¹ Where a resident of Patna, who was the plaintiff in a suit at Madras, came to Madras on receipt of a letter informing him that his presence was required at Madras to prosecute his suit and the case which was posted to 27th October was adjourned for some weeks, he was arrested on the 10th of November, and it was held that as a suitor he was under the circumstances protected from arrest.²

The view taken in this case in Madras was not approved of in Allahabad. A resident of Bombay went to Benares to get an ex parte order passed there against him set aside and put up in a Dak Bangalow. His application was heard and dismissed. He came back to the Dak bangalow and when seated in the railway carriage on his journey to Allahabad, he was arrested in execution of the decree. The Court refused to protect him saying "In the present case, the judgment-debtor had left the Court and had returned to the place where he was staying in Benares; he then left that place and was actually on his way to Allahabad which is not his home. In these circumstances we cannot hold that he, at the time of arrest, was returning from a tribunal within the meaning of S. 135."³

Under the old Code, the immunity was from "arrest under the Code" but the expression in the C.P. Code of 1908 is "arrest under civil process," so that it would appear that a person attending a Court can claim privilege from arrest under the Rent Act.⁴

1. *Samarapeni v. Parry & Co.*, (1889) 13 Mad. 150 F.B.

2. *In the matter of Siva Bux*, (1881) 4 Mad. 317.

3. *Aydeshirji v. Kalyandas*, (1909) 32 All. 3.

4. *Emp. v. Harakh*, (1881) 4 All. 27.

Privilege of
Counsel.

A pleader while acting as such in a Court is exempted from arrest,¹ and so are barristers² and solicitors³ and the Managing clerk of a solicitor⁴ are also protected. The privilege of legal practitioners is not so much for their benefit as it is for the benefit of their clients and is therefore confined to those who are practising,⁵ and the privilege extends only to the Courts where they are entitled to practise.⁶

Privilege of
witnesses.

The privilege of a person arrested in execution of a decree during his attendance at Court for the purpose of giving evidence in the case in which he had been subpoenaed is not given by the law for the personal benefit of the individual affected but for the furtherance of public interests and for the better administration of justice, and the legal definition of the circumstances under which it is claimable, viz. *eundo, morando, et redeundo*, that is, while proceeding to, remaining at or returning from the spot of the legal proceeding, is in itself sufficient to show what really is the scope of the privilege.⁷

The privilege is entire and a person unable to claim his privilege while proceeding to and remaining at the place is not entitled to it while returning from it.⁸

1. *Rajendro Narain v. Chunder Mohan*, (1896) 23 Cal. 128.

2. *Newton v. Constable*, 2 Q. B. 157; *Reynolds v. Newton*, 1 Q. B. 525; *Philips v. Price*, 12 L.J. Q.B. 348.

3. *Att.-General v. The Leathersellers Co.*, 7 Beav. 157; *Castle's Case*, 16 Ves. 412; *Ex parte Ledwich*, 8 Ves. 598; *Gascoyne's Case*, 14 Ves. 113.

4. *Phillips v. Pound*, 7 Exch. 881.

5. *Gardner v. Jessop*, 2 Wils. 44; *Mayor of Norwich v. Berry*, 4 Burr. 2113; *Wiltshire v. Lloyd*, 3 Doug. 381; *Goldsmith v. Baynard*, 2 Wils. 232.

6. *Price v. Chutterbuck*, 1 F. & F. 379.

7. *Newton v. Constable*, 2 Q. B. 157; *Castle's Case*, 16 Ves. 412; *Jones v. Rose*, 11 Jur. 379.

8. *Ex parte Cobbett*, 26 L. J. Q. B. 293.

A witness¹ although tendering his evidence voluntarily² or only going to make an affidavit³ or a witness coming from abroad is protected.⁴ Protection begins from the commencement of the journey and not from the service of the subpoena⁵ but continues over the whole period during which the presence of the witness is necessary.⁶ Where the circumstances of the case show that the witness in visiting the Court had not a bona fide belief that he was wanted for the purpose of giving evidence in the case in which he has been once summoned, he is not entitled to the privilege.⁷ Having once come to Court in good faith to give evidence, the privilege is not lost by some reasonable delay in going home from the Court⁸ and it is immaterial for the purposes of the privilege, if the shortest route home is abandoned in favour of a more convenient road.⁹ The privilege continues during such period as is reasonably occupied in going to, attending, and returning from the place of trial.¹⁰ When a person is in contempt and is brought up in arrest under a writ of attachment for contempt, if he is again arrested on his way to Court,

1. *Moore v. Booth*, 3 Ves. 349; *Ex parte Byne*, 1 V. & B. 316.

2. *Ex parte Byne*, 1 V. & B. 316; *Montagu v. Harrison*, 27 L.J.C.P. 24.

3. *List's Cases*, 2 V. & B. 372.

4. *Walpole v. Alexander*, 3 Dougl. 45.

5. *Gibbs v. Philipson*, 1 R. M. 19.

6. *Ibid.* An ordinary spectator is not exempt from arrest, even in the face of the Court; *Hare v. Hyde*, 16 Q.B. 394.

7. *Wooma Churn v. Teil*, (1875) 14 B. L. R. Ap. 13.

8. *In re Omritolall*, (1875) 1 Cal. 78, 189; *Zinab Bee v. Official Assignee*, (1914) 24 I. C. 573.

9. *In the matter of Socrendra Nath*, (1879) 5 Cal. 106; *In re Omritolall*, (1875) 1 Cal. 78 (90). See however *Jones v. Rose*, 11 Jur. 379; *Pitt v. Coombs*, 3 N. & M. 212; *Williams v. Webb*, 12 L. J. C. P. 89 (if the duration is substantial).

10. *Appasamy v. Govindan*, (1868) 4 M. H. C. R. 145.

he is not entitled to exemption, for, being in contempt he has no privilege in law.¹

Limits of
privilege.

The exemption from arrest, in consideration of a certain character and specified place, includes the stay, and a reasonable time for going and coming. So where a party exempted from arrest by reason of attendance at Court went out of a direct route on his return home for the purpose of attending the funeral of his son, it was held that his privilege was forfeited by the deviation.² "But where a voter at a public election had given his vote, and returned to a house in the neighbourhood to await the result of the official count of the votes, it was held that he was attending to the business of the election and therefore exempt from arrest on civil process. If an elector has not actually proceeded on his way to the voting place, but is merely preparing to go, he cannot claim the privilege. If a person is privileged from arrest until he reaches his home, any delay by reason of sickness or want of funds does not remove the privilege."³

If a person arrives in the vicinity of the Court long before there is any necessity for his presence, he will only be protected against arrests effected after his presence becomes reasonably necessary.⁴

Waiver of
privilege.

"Exemption from arrest is usually a personal privilege which may be waived by the privileged person. The privilege of a legislator however is not his personal privilege but is that of the people whose representative he is ; therefore the privilege cannot

1. *John v. Carter*, (1870) 4 B. R. O. C. 90. See *Martin v. Lawrence*, (1879) 4 Cal. 655.

2. See *Behari Singh v. Emp.*, (1924) 22 A.L.J. 638.

3. *Voorhee's LAW OF ARREST*, 155-7.

4. *Persse v. Persse*, 5 H.L.C. 67.

be waived by him." On the same principle an attorney cannot waive his privilege, for the privilege is really that of his client, whose interests would be imperilled.¹

A privileged person arrested upon civil process is entitled to be discharged out of custody forthwith. He should apply for his release to the Court (if any) whose dignity has been outraged by the arrest² or to the Court out of which the process issued under which he was taken into custody.³ Costs must be awarded against the person at whose instance process was issued.⁴ If the person paid a sum of money in order to procure his release, he is entitled to have it refunded.⁵

Application
for discharge.

No judgment-debtor can claim exemption from arrest under an order for immediate execution or when the judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.⁶ The right to set aside an order of arrest abates on the death of the person against whom the order is made.⁷

An application to discharge a person out of custody or to set aside an attachment on the ground of irregularity must be made within a reasonable time.⁸ A period of nearly three months has been

1. Voorhee's LAW OF ARREST, 154-7.

2. *List's case*, 2 V. & B. 373; *Attorney General v. The Skinner's Co.*, 8 Sim. 377.

3. *Attorney-General v. The Skinners Co.*, 8 Sim. 377; *Plomer v. Macdonough*, 11. Jur. 899.

4. *Eyre v. Barrow*, 27, L.J. Ch. 784; *Dodd v. Holbrook*, 53 L.J. Ch. 175.

5. *Williams v. Webb*, 12, L.J.C.P. 89.

6. C. P. C. S. 135. See O. 21, rr. 11 and 37.

7. (1914) 15 M. L. T. 224=22, I. C. 953.

8. See ANDERSON'S LAW OF EXECUTION, 113-115.

held not to be a reasonable time.¹ The application should state the several objections which the applicant intends to rely upon.²

Grounds of
discharge.

In England the Court has ordered the prisoner's discharge in the following cases:³ where the Court was innocently deceived by the person prosecuting the judgment or order as to a material circumstance;⁴ where the person in default was misnamed in the writ, even though his correct name was afterwards inserted by a judge's order,⁵ and his place of residence and description were omitted;⁶ but not in the case of a small error in the amount of the sum⁷ or other slight inaccuracies;⁸ where the proceedings were suspended by the death, marriage or insolvency of a party to the action⁹; where the bailiff had no warrant,¹⁰ and where his name was inserted in it after it was signed and sealed without the sheriff's authority;¹¹ but not in the case of a small difference between the writ and the

1. R.S.C. O. LXX. r. 2; *Reg. v. Burgess*, 8 A. & E. 275; *Tarber v. French*, 4 A. & E. 362; *Constable v. Fothergill*, 2 Dowl. P. C. 591.

2. *Reg. v. Burgess*, 8 A. & E. 275.

3. R.S.C. O. LXX. r. 3.

4. *Reg. v. Carttar*, 19 L. J. Q. 422.

5. *Reg. v. Burgess*, 2 Jur. 396. (He may however be retaken after his discharge upon the amended writ.)

6. *Bettyes v. Thompson*, 2 Jur. 920; but see *Strong v. Dickenson*, 5 Dowl. P. C. 99; *Davidson v. Duane*, 4 Dowl. P. C. 119.

7. *M'Cormack v. Melton*, 1 A. & E. 331; *Arnall v. Weatherby*, 5 Tyr. 485.

8. *Laroche v. Wasbrough*, 2 T. R. 737; *Newnham v. Law*, 5 T. R. 577; *Shaw v. Maxwell*, 6 T. R. 450.

9. Dan. Ch. Fr. 6th ed. 301, 302.

10. *Collins v. Yewens*, 3 Jur. 951; *Rhodes v. Hull*, 26 L. J. Ex. 265, *In re Sham Sahib*, 1 Ind. Jur. N. S. 19, but not if the warrant is only informal, *In re Bholonath*, Bourke, 96.

11. *Housin v. Barrow*, 6 T. R. 122; *Burslem v. Fern*, 2 Wils. 47, at page 48.

warrant,¹ or of a mistake in the latter;² where the person was privileged from arrest;³ where he was arrested in a county into which no writ had issued;⁴ where the outer door of his house was broken open;⁵ where he was rearrested by the sheriff having been allowed by him to go at liberty;⁶ and where he was induced by fraud to come to this county in order that he might be arrested.⁷

On the other hand, the Court has refused to discharge the person in custody where the writ was issued after a former one which remained unexecuted;⁸ where the person prosecuting the judgment or order died after the delivery of the writ into the sheriff's hands;⁹ where the arrest of the person in default was effected by one only of four bailiffs to whom the warrant was jointly addressed;¹⁰ and where it took place within the verge of one of the royal palaces.¹¹

The fact that detainers have been subsequently lodged against the person does not affect his right to

1. *Rose v. Tomblinson*, 3 Dowl. P. C. 19.

2. *Williams v. Lewis*, 1 Chit. 611.

3. *Bartlett v. Hibbes*, 5 T. T. 686; but see *Luntley v. Battine*, 2 B. & Al. 234.

4. *Webber v. Manning*, 1 Dowl. P. C. 24; *Storer v. Rayson*, 4 D. & R. 732 (If the arrest takes place on the borders of the county it will be good).

5. *Hodgson v. Towning*, 5 Dowl. P. C. 410.

6. *Filewood v. Clement*, 6 Dowl. P. C. 508. (Lapse of time will not be an objection to a discharge on this ground.)

7. *Stein v. Falkenhuyzen*, 27 L. J. Q. B. 236.

8. *Andrews v. Walton*, 1 Ph. 619.

9. *Ellis v. Griffith*, 16 L. J. Ex. 66.

10. *Boyd v. Durand*, 2 Taunt. 161. An action might lie against the bailiff for arresting without proper authority: *per* Mansfield C. J.

11. *Sparks v. Spink*, 7 Taunt. 311; *Bell v. Jacobs*, 4 Bing. 523; *Kirkpatrick v. Kelly*, 3 Dougl. 30.

be discharged where the original arrest was illegal.¹ A detainer under a writ is not, however, vitiated by reason of an intermediate writ that was void having been executed by detainer.²

1. *Ex parte Preston*, 30 L. J. Ch. 460; *Barratt v. Price*, 1 Dowl. P. C. 725; *Pearson v. Yewens*, 7 Dowl. P. C. 451; but see *Watson v. Carroll*, 7 Dowl. P. C. 217; *Robinson v. Yewens*, 7 Dowl. P. C. 377; *Hooper v. Lane*, 6 H. L. 443.

2. *Wright v. Santford*, 1 Dowl. N. S. 272.

CHAPTER XVI

Attachment

Attachment and sequestration—Attachment in India — Forms of attachment—Seizure — Charging order—Proclamation—Garnishment — Attachable property — Exemptions from attachment—Saleable property—Disposing power—Money—Money deposited as security or fine—Price of pre-emption—Compensation for acquisition of land—Shares and stocks—Goods —Ship—Goods with servant or agent—Goods subject to lien—Goods under pledge—Inchoate interest in moveables—Goods under conditional sale—Goods under hire-purchase—Goods in transit—Goods of partnership—Railway property—Crops—Debt—Debt must be certain and perfected—Debt must be recoverable by judgment-debtor—Debt beyond jurisdiction—Contingent debt—Cheques—Claim against Insurance companies—Property beyond the control of the judgment debtor—Debts due by a judgment creditor—Debt due by a co-judgment-debtor—Mortgage debts—Debts in suit—Judgment-debt—Real property—Lands—Interest of co-tenant—Interest of mortgagee—Property held under contract of sale—Property contracted to be sold—Property pending confirmation of court sale—Leaseholds—Tenures—Other interests in land—Naked title—Profits—Wearing apparel—Tools of artisans—Agriculturist—His implements—His cattle and seed-grain—His house—Right to sue for damages—Actionable claim—Right of personal service—Personal contracts—Stipends and gratuities—Pensions—Political pension—Private pension—Pay and allowances of officers—Public officer—Pay of Native Army—Provident Fund—Contingent interests—Future maintenance—Property of societies.

Attachment is the process by which the Court takes hold of the property of a judgment-debtor or other person against whom an order remains unanswered, and keeps it in its custody preliminary to applying it or its proceeds towards the satisfaction of the claim which it means to enforce. It is sometimes used loosely as a synonym of sequestration,¹ but in its legal significance, sequestration, as technically understood in English practice, is not copied in the Indian law. The writ of sequestration

Attachment
and sequestration.

1. See *Kishen Lal v. Ummatul Fatima*, (1914) 17 O.C. 207 = 25 I.C. 384.

is a process available when the person against whom it is issued is in contempt for disobedience of the Court and every decree, order or judgment can be enforced by sequestration. The writ of sequestration binds the property other than choses in action from the date of its issue and the sequestrator must on receipt of the writ take possession of all the real and personal estate of the judgment-debtor and manage the same until it is sold and proceeds applied towards the satisfaction of the judgment.¹

Attachment
in India.

An attachment in India, as will be seen hereafter, merely prohibits an alienation by the judgment-debtor to the prejudice of the claim of the judgment-creditor and except in the case of moveable property capable of direct seizure, the property attached is left where it is and if the property is immovable and the judgment-debtor is in possession, he continues to manage and receive the rents from it until it is sold and the purchaser takes delivery.

Forms of
Attachment.

An attachment therefore is only meant to prevent an alienation or suppression. The mode therefore adopted in attachment varies with the nature of the property that is to be attached. It may be by actual seizure, by proclamation, by a charging order, or by garnishment.

Seizure.

For an attachment by seizure physical contact with the goods is not essential,² nor does such contact necessarily mean a seizure.³ It always is a question of fact.⁴ Any act, which if not done with

1. See Halsbury's Laws of England, XIV. 79.

2. *Bissicks v. Bath Colliery Co.*, (1877) 2 Ex. D. 459; (1878) 3 Ex. D. 174 C. A.

3. *Re Davies*, (1872) 7 Ch. App. 314; *Re Williams*, (1880) 42 L. T. 187.

4. *Bird v. Bass*, (1843) 6 Man. & G. 143; *Balls v. Thick*, (1845) 9 Jur. 304; *Bower v. Hett*, (1895) 2 Q. B. 51.

the authority of the Court, would amount to a trespass to goods will constitute a seizure when done under the writ.¹ Mere entry upon the premises and a demand for the debt by the bailiff, though with a warrant, is not sufficient for a seizure,² but even when the premises are extensive and the goods lie scattered,³ an intimation of an intention to seize the goods⁴ or some act signifying such intimation⁵ will amount to a valid seizure. A seizure of a part of the goods will amount to a seizure of the whole.⁶

A charging order is made in cases where the judgment-debtor's interest in any property, such as in a firm, is unascertained. Charging order.

A proclamation is made in the customary mode by beat of tom-tom and by affixture of the order on the property attached, in cases like the attachment of immovable property, where actual seizure is impossible. Proclamation.

"Garnishment is a legal proceeding, assimilated to attachment intended to reach debts or choses in action, the property of the debtor, not capable of seizure by execution or attachment, or to compel the discovery of effects capable of seizure, in the possession of third parties."⁷ Whoever claims any right to proceed by garnishment must show that the property against which he seeks such right has been made liable by statute.⁸ If therefore the Civil Garnishment.

1. *Mortimore v. Cragg*, (1878) 3 C. P. D. 216 C. A.; *Andrews v. Sanderson*, (1857) 1 H. & N. 725.

2. *Nash v. Dickenson*, (1867) 2 C. P. 252.

3. *Gladstone v. Padwick*, (1871) 6 Ex. 203.

4. *Bissicks v. Bath Colliery Co.*, (1877) 2 Ex. D. 459; (1887) 3 Ex. D. 174. C. A.

5. *Balls v. Thick*, (1845) 9 Jur. 304.

6. *Cole v. Davies*, (1698) Ld. Raym. 724.

7. Freeman on EXECUTIONS, I. 764.

8. Ibid. I. 765.

Procedure Code or any other law for the time being in force exempts any species of property from execution and sale, the same cannot be reached by the indirect means of a garnishment.

Attachable
property.

“The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Exemptions
from
attachment.

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;
- (b) tools of artizans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from

Read at page 85.

“ To clause (i) of the proviso of sub-section (1) of section 60, C. P. Code, 1908, the following proviso shall be added, namely :—

‘ Provided that where the decree-holder is a society registered or deemed to be registered under the Co-operative Societies Act, 1912, and the judgment-debtor is a member of the society, the provisions of sub-clauses (i) and (ii) shall be construed as if the word ‘ twenty ’ were substituted for the word ; “ forty ” wherever it occurs and the word ‘ forty,’ for the word ‘ eighty’.”

1. As added by Act XX of 1925. The Act was published in the Fort St. George Gazette on 6-10-1925,

liability under the provisions of the next following section ;

- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ;
- (d) books of account ;
- (e) a mere right to sue for damages ;
- (f) any right of personal service ;
- (g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf, and political pensions ;
- (h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ;
- (i) the salary or allowance equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—
 - i. the whole of the salary, where the salary does not exceed forty rupees monthly ;
 - ii. forty rupees monthly, where the salary exceeds forty rupees and does not exceed eighty rupees monthly ; and
 - iii. one moiety of the salary in any other case ;
- (j) the pay and allowances of persons to whom the Indian Articles of War apply ;

- (k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment ;
- (l) the wages of labourers and domestic servants whether payable in money or in kind ;
- (m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;
- (n) a right to future maintenance ;
- (o) any allowance declared by any law passed under the Indian Councils Acts, 1861, and 1892, to be exempt from liability to attachment or sale in execution of a decree ; and
- (p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property, which under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

*Explanation :—*The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable.

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of

decrees for rent of any such house, building, site or land.”¹

The provisions of this section must be strictly construed,² so that, for instance, if houses and other buildings of an agriculturist are exempted from attachment, the exemption must not be extended to cover vacant sites used by the agriculturist for storing manure and fodder.³ But a decree-holder is entitled under the Code to attach the properties of the judgment-debtor and there is no restriction in this section or any other provision on the extent to which attachment may go. There is no rule to the effect that the properties of the judgment-debtor are to be attached only to the extent that may be necessary for the satisfaction of the decree.⁴

This section relates to property that may be attached. It has no application to cases where no attachment is necessary. The validity of a mortgage hypothecating any of the things mentioned here as exempt from attachment must be judged by other enactments such as section 6 of the Transfer of Property Act and if it is not open to objection under any such enactment, the Court cannot refuse to pass a decree for sale.⁵

All saleable property which belongs to the judgment-debtor can be attached in execution. The word ‘saleable’ means saleable at a compulsory sale

Saleable property.

1. C. P. C. S. 60 (=Old Code, 266).

2. *Jahangir v. Hira*, (1917) P.L.R. 21=39 I.C. 375.

3. *Ibid.*

4. *Munshi Kali Sankar v. Maharajah Protap Udainath*, (1912) 16 I.C. 708.

5. *Bholanath v. Mt. Kishow*, (1911) 34 All. 25 F.B. (Banerji J. dissenting) [differing from *Rain Dial v. Narpal Singh*, (1909) 33 All. 136 and *Galzari v. Bhikari*, (1911) 8 A.L.J. notes of cases, 38]; *Bhagvandas v. Hathibhai*, (1879) 4 Bom. 25. See also *Sadashiv v. Jayantibai*, (1883) 8 Bom. 185.

by order of Court and not transferable by act of parties. For instance, if under a condition in a permanent lease, the landlord has a right of re-entry, if the lessee privately transfers the land, the condition does not operate to prevent an attachment and sale of the leasehold in execution of a decree against the tenant and the land-lord's right of re-entry does not come into operation.¹ So country liquor is not unsaleable, though under the Abkari Act the Collector's permission may be necessary for its sale.² Likewise beer brewed within the local limits to which the Excise Act applies is not exempt.³ The right to manage a trust⁴ or a religious office⁵ is not saleable. The doors and windows of a building are not separately saleable⁶ and so is a portion of *bhag*⁷ or of a saleable tenure.⁸

If the property is in the disposing power of the judgment-debtor it is attachable. Property over which the owner has declared a valid trust,⁹ trust property in the hands of a trustee,¹⁰ and property of an insolvent which has vested in the official assignee on insolvency,¹¹ are not in the disposing power of the owner, trustee, insolvent respectively and are not therefore attachable in execution of decrees against them. So an auctioneer has no disposing

1. *Keshab Chandra v. Ajahar Ali*, (1914) 19 C.W.N. 1182=28 I.C. 837; *Golak Nath v. Mathuranath*, (1893) 20 Cal. 273.

2. *Purshottam v. Balwant*, (1908) 10 Bom. L.R. 13.

3. *Bhargava Commercial Bank v. Mackinnon & Co.*, (1914) 11 N.L.R. 67=29 I.C. 339

4. *Ravivarma Tambaran v. Raman Nayar*, (1882) 5 Mad. 89.

5. *Kuppa Gurukul v. Dorasami*, (1883) 6 Mad. 76.

6. *Peru v. Ronno*, (1884) 11 Cal. 164; *Q. E. v. Shaik Ibrahim*, (1890) 13 Mad. 518.

7. *Narbhe Ram v. Collector of Broach*, (1897) 22 Bom. 737.

8. *Reily v. Huro Chunder*, (1882) 12 C.L.R. 398.

9. (1905) P. L. R. 7.

10. *Bishen Chand v. Nadir Hossain*, (1887) 15 Cal. 329; *Mohuput v. Shaikh*, (1875) 19 W. R. 226.

11. *Dencbundoo v. Shoshi Mohun*, (1882) 12 C.L.R. 60.

power over the money payable to him for goods sold for his clients.¹

Property granted to a widow by way of maintenance without power of alienation² or property given with a proviso that it should be impartible³ is not attachable. So is the income of property subject to a restraint on anticipation accruing due after judgment in the case of a decree against the separate property of a married woman.⁴ Where, the holder of a decree for foreclosure and possession agrees with mortgagor that if the latter pays the amount due by a certain date he would surrender the property and accept the money and the mortgagor mortgages the property to C for Rs. 1000 but does not pay the money to the decree-holder who is put in possession, the sum of Rs. 1000 belongs to C and cannot be attached in execution of a money decree against the mortgagor.⁵ A cover containing currency notes lying with the post office for delivery is attachable as the property of the addressee.⁶ In the case of lands granted as Jagir without power of alienation, the land is inalienable but the crops standing in it can be attached in execution of a decree.⁷ The cash balance of an estate under the Court of Wards is not exempt under the Bengal Court of Wards Act, 1879, from attachment under a simple money decree against the Ward.⁸

1. *Smith v. Allahabad Bank*, (1901) 23 All. 135.

2. *Diwali v. Apaji*, (1886) 10 Bom. 342. See later in this chapter for a fuller discussion.

3. *Narayanan v. Kannan*, (1884) 7 Mad. 315.

4. *Goudoin v. Venkatesa*, (1907) 17 M. L. J. 363.

5. *Chunni Lal v. Lachman Prasad*, (1883) A.W.N. 258.

6. *Narasimhulu v. Adiappa*, (1890) 13 Mad. 242.

7. *Bansi Ram v. Narasingha*, (1914) 24 I.C. 805.

8. *Upendranath Sen v. Umakanta*, (1914) 22 I. C. 694.

Money.

Money whether in specie or bank notes (which are treated *civiliter* as money) if in the possession of the defendant or capable of being identified as his property may be taken in execution, but there can be no levy of money, unless the identical money is the property of the judgment-debtor. In cases where he has money owing to him or he has deposited moneys with another, such as a bank, who has undertaken to return to him an equal or a greater sum there is no money but a mere indebtedness.¹ That is, money, to be seizable, must be in the possession or control of the debtor and not be merely payable to or held in trust for him.² Moneys, or notes enclosed in covers, lying in transit with the post office addressed to the judgment-debtor can be attached by his creditors, for the post office is but the agent of the addressee,³ even though the sender had, before the day of attachment, applied for its return to him.⁴

Where moneys or bank-notes are seized they come under the custody of the Court, but they do not become the property of the judgment-creditor until they are actually paid over to him.⁵

Money
deposited as
security or
fine.

Where moneys or other valuable securities are deposited as security for the due performance of their duty by servants in the employ of another, the Court may, in execution of a decree obtained against the depositor, place an attachment on such

1. Freeman on EXECUTIONS, I. 426.

2. *Willows v. Ball*, (1806) 2 Bos. & P. (N.R.) 376; *Harrison v. Paynter*, (1840) 6 M. & W. 387; *Robinson v. Peace*, (1838) 7 Dowl. 93.

3. *Parmer v. Cowasjee*, (1916) 14 A. L. J. 236 = 33 I.C. 723.

4. *Narasimhulu v. Adiappa*, (1890) 13 Mad. 242.

5. *France v. Campbell*, (1842) 6 Jur. 105; *Collingridge v. Paxton*, (1851) 11 C.B. 683.

deposits, subject to the lien of the employer, but cannot proceed to order the sale thereof until the deposit is at the disposal of the judgment-debtor free from such lien and if the deposit carries interest, and the interest is not, under the terms of the contract between the employer and the employee, at the disposal of the employer, order may be made for payment to the judgment-creditor of the interest as it from time to time falls due.¹ So is money deposited by judgment-debtor for the due performance of a contract.² Similarly money deposited by a judgment-debtor with a stockbroker to secure any loss on speculations on stocks or shares cannot be attached so long as the transactions in the stocks or shares are open.³ Money paid into Court as fine in a criminal case is attachable, if the sentence is reversed.⁴

Where a person holding a decree for pre-emption pays the pre-emption price into Court in compliance with such decree, it is not competent to the Court to pay out any portion of it to any one other than the person entitled to it under the decree, so as to prejudice the rights of the decree-holder to possession, and such money is therefore not attachable at the instance of a creditor of such decree-holder.⁵

Price of
pre-emption.

Where before the execution of a mortgage decree for the sale of land, such land was acquired by Government under the Land Acquisition Act, 1870, and the holder of the decree failed to put in a

Compensation
for acquisition
of land.

1. *Karuthan v. Subramanya*, (1886) 9 Mad. 203.

2. *S. B. Das v. Muthia Chetty*, (1920) 12 Bur. L. T. 247=56 I.C. 948.

3. *Hutt v. Shaw*, (1887) 3 T.L.R. 354.

4. *Harmansingh v. Saligram*, (1912) P.R. 89=16 I.C. 779.

5. *Abdus Salam v. Wilayat Ali*, (1897) 19 All. 256.

claim under section 9 of the Act, it was held in Allahabad, that he was disentitled to attach, as under the decree, the money in the hands of the Collector, which is the amount of the compensation awarded by the Government to the mortgagor.¹ A different view was however taken in Calcutta, and execution of the mortgage decree was allowed by attachment of the compensation money on the ground that the mortgagee holding a mortgage executed even subsequently to the declaration by the Government towards the acquisition should not be compelled to obtain a further decree under section 90 of the Transfer of Property Act.²

Cheques.

A cheque payable to a debtor and in the hands of the Paymaster-General of the High Court, *a fortiori* of an officer of a Court, but not delivered cannot be seized,³ but a cheque delivered out to an agent, though returned by him to the office can be seized.⁴

Shares and stocks.

Shares and interests in a Corporation are attachable, but the interests such as in a Society for Yachting etc., which have no commercial value are not. The situs of stock for execution is at the domicile of the Corporation.⁵ Securities for money do not include policies of insurance⁶ nor pawnbroker's pledges.⁷

1. *Basal Mal v. Tajammal*, (1893) 16 All. 78.

2. *Jotoni v. Amor Krishna*, (1904) 13 C.W.N. 350=1 I.C. 164. See also *Armarchandra v. Ramsunder*, (1909) 13 C.W.N. 350=1 I.C. 45; *Venkatrama v. Esumsa Rowthen*, (1909) 7 M.L.T. 143=5 I.C. 92.

3. *Courtoy v. Vincent*, (1852) 15 Beav. 486.

4. *Watts v. Jefferyes*, (1851) 3 Mac. & G. 422.

5. FREEMAN ON EXECUTIONS, I. 435.

6. *Alleyne v. Darcey*, (1855) 5 I. Ch. R. 56; *Re Sargent's Trust*, (1879) 7 L.R. Ir. 66.

7. *Re Rollason*, (1887) 34 Ch. D. 495.

All goods belonging to a judgment-debtor are Goods. attachable. 'Goods' mean and embrace all moveable property.¹

A ship (British or foreign)² can be seized and Ship. the seizure is effected by putting a man aboard with a warrant, which he is to affix to the mast and the sale of a British ship is completed by the transfer of the ship or share by a bill of sale.³

Property in the possession of a servant or an agent Goods with servant or agent. is deemed to be in the possession of the principal. So money in the hands of ticket-sellers or treasurers of a Corporation or station-agents of transport companies cannot rightly be reached by garnishment. But the majority of Courts in America have held that when a servant or agent is garnished, he becomes bound to hold the money subject to the order⁴.

Goods, belonging to the judgment-debtor, Goods subject though subject to the lien of an innkeeper⁵ or for work to lien. done upon them⁶ can be seized, but goods taken under a distress for rent,⁷ pledged or hired out by the judg-

1. See Indian Contract Act (IX of 1872), S. 7. As to sale of goods and title to goods sold, see *ibid.* Chap. VII. 'Goods' do not include documents showing title to them nor money or currency notes, *Koti Venkatramayya v. The Official Assignee of Madras*, (1909) 33 Mad. 196; *Mohan Nandp v. Haridas*, (1917) 24 C.L.J. 335=37 I.C. 707.

2. *Union Bank of London v. Lenanton*, (1878) 3 C.P.D. 243 C.A.; *Chasteauneuf v. Capeyron*, (1882) 7 A.C. 127 P.C.; *Dickinson v. Kitchen*, (1858) 8 E. & B. 789.

3. Under the Merchant Shipping Act, 1894, (57 & 58 Vict. c. 60), Ss. 2, 24; *Autin v. Ahmed*, 1 Ind. Jur. N. S. 241.

4. Freeman on EXECUTIONS, I. 783—5.

5. See *Proctor v. Nicholson*, (1835) 7 P.C. 67.

6. *Duncan v. Garratt*, (1824) 1 C. P. 169.

7. *Haythorn v. Bush*, (1834) 2 Cr. & M. 689. But the landlord may waive his rights; see *Belcher v. Patten*, (1848) 6 C. P. 608 (618).

ment-debtor,¹ or goods in bond for advances made,² cannot be seized, unless, perhaps, the advances be paid off by the execution-creditor.³

Goods under
pledge.

Moveable property belonging to the judgment-debtor, though under a pledge or mortgage, can be followed in execution. The procedure differs in different States in America. It may be that the decree-holder sells the mortgaged chattel subject to the rights of the mortgagee or tenders him the amount due before taking actual possession. It may also be that the mortgagee is garnished and asked to take the amount actually due. It may also be that the property is seized and sold and unless the purchaser gives the money due to the mortgagee, he cannot take it from Court. Lastly the mortgagor's interest may be sold without actual seizure of the property.⁴ This last course has been adopted in India and the delivery to the purchaser is made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.⁵

Conversely, goods, though belonging to others, can be seized, if the judgment-debtor has a saleable interest in them and such interest may be sold. If goods are hired to the judgment-debtor for a term, the right of user can be sold.⁶ But if the hiring is

1. *Garstin v. Asplin*, (1815) 1 Madd. 150; *Balls v. Thick*, (1845) 9 Jur. 304. It was suggested in *Rogers v. Kennay*, (1846) 15 L.J. Q.B. 381 that the right to redeem can be disposed of by seizure and sale of the pawn-tickets.

2. *Young v. Lambert*, (1870) L.R. 3 P.C. 142.

3. *Scott v. Scholey*, (1807) 8 East 467.

4. Freeman on EXECUTIONS, I. 484-5, 496. For the procedure in England, see Halsbury's Laws of England, XIV. 50.

5. C.P.C., O. 21, r. 79 (2)

6. *Gordon v. Harper*, (1906) 7 Term Rep. 9; *Pain v. Wittaker*, (1824) Ry. & M. 99; *Bradley v. Copley*, (1845) 1 C.B. 685.

such that there is no saleable interest,¹ or if the interest had ceased before seizure,² or is determinable by the event of the seizure,³ the interest is not leviable. Where, as in the case of pawn-brokers, the judgment-debtor has a right of sale, his interest can be seized.⁴ Where however he has a mere lien⁵ or is merely a borrower or deposit⁶ goods cannot be attached, even if the judgment-debtor so acts as to appear to be the owner of the goods.

That is, where the terms of the hiring amount to a mere licence and preclude a transfer of interest, as when a waggon is hired that it should be used 'for the baker business,' and should not be sold or loaned, the legal effect of the hiring is to confer on the beneficiary a mere personal licence, not subject to execution. In a case in the State of Manetosa, certain sheep were lent to A to keep for 3 years. A was entitled to the increase and was to deliver annually a quantity of wool. At the end of the term A was to retain the same number of sheep as were lent to him. Within the first year the sheep were seized under process against A. The Court regarded the transaction as a personal bailment induced by special confidence reposed in A and conferring on him certain rights and interests which for their continuance were to depend upon the continued exercise of his skill and labour in managing the property.⁷

"Inchoate interests which do not become settled or perfect until lapse of specified time or per-

Inchoate
interest in
moveables

1. *Cooper v. Willomatt*, (1845) 1 C.B. 672.

2. *Manders v. Williams*, (1849) 4 Ex. 339.

3. *Jelks v. Hayward*, (1905) 2 K.B. 460.

4. *Re Rollason*, (1837) 34 Ch. D. 495.

5. *Legg v. Evans*, (1840) 6 M. & W. 36.

6. See *Dawson v. Wood*, (1810) 3 Taunt 256.

7. *Freeman on EXECUTIONS*, I. 494-5.

formance of certain conditions cannot be seized. * *
 A large number of sheep were by their owner placed in possession of another to be cared for and fed until ready for market. He was to be paid for his services what they would bring in the market over the first cost and expenses and interest on the money advanced. It was held that it did not create a partnership between the owner and the person feeding nor any proprietary interest whatsoever in the latter.¹ * * * * If a land-owner stocks his farm and puts it in charge of tenant, under an agreement that the tenant shall have one half of the growth of stock and one half of produce by the sheep, the latter has prior to the expiration of the lease only an inchoate interest incapable of attachment. Similar principles apply between owner of lands and cropper, when the former is to have one half of the crops 'in the half bushel.' In such cases it is considered that the title belongs to the cropper until it is threshed, measured and one part set off to the landlord; until this division, the landlord's half is not liable to execution. So where A was to cut down trees and haul the logs to a certain place for market and B, the owner of the land, was to sell the logs and after deducting stumpage and advances made for supplies was to pay A the balance, it was held A had no interest in the logs subject to execution.* * * * *

But if one obtains the ownership of property with a right to its possession his title is not to be regarded as inchoate merely because he has not paid for it. Thus, where a contract was entered into by the terms of which the owner of a stone quarry

1. See *Maung Nyan v. Ko Maung*, (1922) 1 Bur. L. J. 164; Indian Contract Act (IX of 1872), S. 108.

permitted certain contractors to quarry and remove stone for two outlet locks in Pennsylvania Canal, the quantity to be ascertained by measurement, when in the locks, and to be paid for as soon as payments were made by the contractors on the canal, it was held that as soon as the stone was quarried, though it remained at the mouth of the quarry, it was subject to execution against the contractors on the ground that the land-owner had trusted to his personal responsibility."¹

"Goods are often consigned to a dealer, factor or other agent for the purpose of sale and there can be no doubt that this does not itself give him any interest in them, subject to execution. Whether goods placed in the hands of another for sale are so placed as the result of a conditional sale to him or in pursuance of an agreement that he shall receive and sell them and account for the proceeds, there is no doubt that he acquires no interest in them which can be subject to execution in prejudice to the rights of the owner. The latter may however by his contract seek to secure to himself advantages which are not consistent with anything less than a sale of the property and when such is the case, the transaction must be treated as an absolute sale, no matter by what name the parties thereto may agree to call it. The chief difficulty is in determining whether when the parties themselves by their contract disclaim a sale of the property, such disclaimer cannot be accepted, because the rights and obligations resulting from the contract are consistent with nothing but a sale * * * The general rule would seem to be that, where the contract does not look to an absolute acquisition of title by

Goods under
conditional
sale.

1. Freeman on EXECUTIONS, I. 503-5.

the consignee, agent or vendee or his becoming absolutely responsible for the purchase price, the sale cannot be regarded as absolute or as creating in his favour any interest in the goods, rendering them subject to execution against him. It seems to make no difference that the vendee had been intrusted with apparent ownership of the property, with power to dispose of it in the ordinary course of business. When R furnished G with a stock of ready-made clothing, with which to go in business in G's name, the property to remain R's and G was to purchase of no other person but R, was to do cash business only and to remit the proceeds to R, after taking out his salary and expenses, it was held that the goods were not subject to execution against G. But this principle in regard to conditional sales will not be allowed to support mere devices resorted to for the purpose of avoiding creditors."¹

"Where an apparent absolute liability on the part of the consignee or vendee for the property is created by the contract, the sale must be deemed unconditional or absolute, though such contract declares that it is not, and seeks to reserve title to the vendor until payment of the purchase price. By a contract entered into between two persons, it was agreed that one of them should deliver certain property to the other for sale on commission at retail prices, and that commission should be the difference at which the property was sold and the price at which it was billed on the consignments. The consignee agreed to sell for cash or to take notes in the name of the consignor to be paid for by the consignee if not honored in due time. This contract was held to be an absolute sale to the consignee."¹

¹ FREEMAN ON EXECUTIONS, I. 511-3.

So where wholesale dealers in coffee appointed persons designated agents who agreed to sell in the regular course the goods consigned, the title to remain in the consignor and the goods were to be sold in the name of the consignees at their own prices and they were to pay for the goods at 60 days' credit and to remit the full price at the end of that time, whether goods were sold or unsold, it was held to be an absolute sale.¹

Sometimes the contract is put in the form of a lease, whereby the lessee agrees to pay a stipulated sum as rent and after making all the payments provided for is to be deemed the owner of the property. Such a contract is not a lease, but a sale, complete or conditional, and this depends on the circumstances. When the memorandum of sale was "Brighton, July 7, 1873, John MacDonald bought of D. McKinney & Son, one mare for £ 300. Paid £ 50. The mare to be paid for August 1st; if not to be returned to McKinney & Son;" it was held that the title vested in the purchasers at once.² With respect to the construction of contracts claimed to be conditional sales the Supreme Court of United States said "The answer to this question is not to be found in any name which the parties may have given to the instrument and not alone or any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought. The form of the instrument is of little account."³

Goods under hire-purchase.

1. Freeman on EXECUTIONS, I. 513-15.

2. *Ibid.* I. 515-6.

3. *Heryford v. Davis*, 102 U.S. 243.

Where an agreement recited the borrowing of an article, on condition that if the price named should be paid, it should belong to the borrower, otherwise to remain the property of the vendor, that it should not be removed from any specified premises until payment, that if the borrower failed to meet any of the payments, the lender might take the property, sell it and pay all surplus after paying the price agreed upon and the expenses of removal and sale, the Court held it was an absolute sale.¹

A hire-purchase agreement is not an agreement of sale until the condition specified therein is fulfilled.² Generally speaking, the ownership of goods obtained on hire-purchase system does not pass until the last instalment is paid³ and when the owner has not exercised his option of purchasing them.⁴

Goods in transit.

Goods are said to be in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.⁵

1. Freeman on EXECUTIONS, I. 519.

2. *Singer Manufacturing Co. Ltd. v. Govind*, (1914) 7 S.L.R. 103=23 I.C. 801. See also *Leon Sawbelle v. K.V. Seyne Bros.*, (1918) 23 C.W.N. 352=50 I.C. 476; *Albert v. Singer Sewing Machine Co.*, (1919) 52 I.C. 50; *Emp. v. Silas Moses*, (1915) 17 Bom L.R. 670=30 I.C. 649; *Balasundaram v. Krishna Aiyar*, (1915) 2 L.W. 339=28 I.C. 633.

3. *Srinivasa Aiyangar v. Douglas*, (1919) 57 I.C. 62.

4. *Singer Manufacturing Co. v. Niaz Ali*, (1919) P.R. 54=46 I.C. 888; *Ahmad Jan v. Singer Sewing Machine Co.*, (1922) 3 Lah. L.J. 249=67 I.C. 638.

5. Indian Contract Act (IX of 1872), S. 100. For seller's right of stoppage etc, see Ss. 101-109.

Where the transit has ended or before it begins, goods consigned through a carrier can be garnished. In America, in the course of transit, they cannot be garnished, for, "When the transit has begun, it becomes extremely difficult for a carrier to ascertain whether it has in its possession goods sought to be garnished and the performance of its duties to the public must be very seriously impaired if it is required of them to make an examination for the purpose of suspending the transit of the goods garnished or to determine whether it must, at the end of the transit, refuse to deliver them and hold them subordinate to the rights of the garnishing creditor."¹ There is nothing on the law of India exempting goods in transit from attachment, though the attachment can affect only the interest which the judgment-debtor has on the goods.

A copartner has no right to any specific chattel belonging to the firm nor has he any right against the firm to take or hold exclusive possession of any chattel. The interest of each partner is merely a right to share in the proceeds of those chattels after all the partnership obligations have been satisfied. The creditor of an individual partner cannot sell any specific article but only the partner's interest in the whole of the partnership assets and the purchaser does not acquire the right to hold possession of the property purchased as against the other members of the firm but only an interest in the proceeds after the business of the firm shall have been settled. A decree against the firm can be executed against firm's property.² Under the C.P. Code, 1908,

Goods of
partnership.

1. Freeman on EXECUTIONS, I, 307.

2. Freeman on EXECUTIONS, I, 519, 529-30.

the Court may make an order charging the interest of any partner in the partnership property and profits.¹

Railway
property.

Under the Indian Railways Act 1890, "none of the rolling stock, machinery, plant, tools, fitting, materials or effects used or provided by a railway administration for the purpose of the traffic on its railway, or of its stations or workshops, shall be liable to be taken in execution of any decree or order of any Court or of any local authority or person having by law powers to attach or distrain property or otherwise to cause property to be taken in execution, without the previous sanction of the Governor-General in Council. But this does not affect the authority of any Court to attach the earnings of a railway in execution of a decree or order."² Other properties belonging to Railway companies such as surplus lands may be attached.³ The attachment of a Railway station in execution of a decree is not illegal, but where the defendant is a Railway Company, as to the solvency of which there can be no reasonable doubt, the Court will be justified in ordering sufficient notice to issue prior to attachment, unless it sees reason to think that the Company was wilfully avoiding performance of the decree.⁴ The creditor may ask for the appointment of a receiver and if necessary of a manager of the Company's undertaking.⁵ If a Railway Company has filed a scheme of arrangement with

1. See C.P.C., O. 21, rr. 49—50. and Vol. I. 559; *Jagat Chunder v. Iswar Chunder*, (1893) 20 Cal. 693.

2. Act IX of 1890, S. 136. Compare Railways Companies Act, 1867, (30 & 31 Vict. c. 27), S. 4.

3. *Re Hull, Barnsley and West Riding Junction R. Co.*, (1888) 40 Ch. D. 119 C.A.

4. Madras H. C. Cir. No. 3750, dated 20th Dec. 1884.

5. Railways Companies Act, 1867 (30 & 31 Vic. c. 60), S. 4.

its creditors, of which notice has been formally given no execution may be issued without the leave of the Court until after the scheme has been enrolled or rejected by the court.¹

Crops growing and standing are moveable Crops. property² and can be seized as such in execution.³ "Where crops have been raised by one person on the land of another, under a lease or contract by which he and the owner of the land share in such crops there is some doubt concerning the nature of the interest of the parties and therefore some difficulty in determining when and against whom they are subject to execution * * * In by far the greater number of cases the contract of leasing is such that both parties at all times have an interest in the crops prior to their division as tenants in-common thereof and when this is so, the nature of each is necessarily subject to an execution against him. The question is one of intention to be determined from the whole contract. If the contract shows that it was the intention of the parties to divide the specific products of the premises, the intention would seem to be that each should at all times prior to the division have a title to his moiety of such products. If, on the other hand, the lease or contract contains words imposing a personal demise or a reservation of a portion of this crop as rent, the parties seem to stand towards each other in the relation of debtor and creditor, the debt being payable in produce and the tenant is

1. *Ibid.* S. 9.

2. C. P. C., S. 2 (13); *Evans v. Roberts*, (1826) 5 B. & C. 829; *Scorell v. Boxall*, (1827) 1 Y. & J. 396. Under the Limitation Act, they are treated as immovable, *Devarasetti Narasimham v. Devarasetti Venkiah*, (1915) 18 M.L.T. 532=31 I.C. 796.

3. FREEMAN ON EXECUTIONS, I. 447.

the sole owner of the produce until the part due to the landlord is segregated and paid to him. Where this is the case, the crops are subject to execution against the tenant but to none against the landlord. The leasing or contract, taken as a whole, may in substance provide that the cropper gives his services in consideration of receiving a portion of the crop. In this event he is regarded as having possessed of the land merely for purposes of cultivating and harvesting his crop; the obligation of the landlord to him is in the nature of a debt merely, and he has no title to any crop until its segregation and payment to him. His interest is not subject to execution." Crops grown on leasehold land by the heir of a tenant after his death cannot be said to be the tenant's crops and are not liable to attachment.¹

Debt.

Debts due to the judgment-debtor are liable for attachment.

A debt, in its primary sense is a liquidated money obligation usually recoverable by suit.² In general, says Blackstone, "whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other (as in the case of a bond for payment of money or an implied promise to pay for goods supplied, so much as they shall be reasonably worth), a debt is then said to exist between these parties; while, on the other hand, if the demand be of uncertain amount, as when an action is brought against a bailee for injury done through his

1. *Kidar Nath v. Ganesha Mal*, 84 P.W.R. 1916=33 I.C. 741; *Abdul Aziz v. Sarab Dayal*, (1923) 69 I.C. 520.

2. *Webster v. Webster*, (1862) 31 Beav. 393; *Sabjir v. Noordin*, (1898) 22 Mad. 139 (144).

negligence to an article committed to his care, it is described not as a *debt*, but a claim for damages." Debts are of two kinds, payable at present and payable in future, and are called in England 'owing and accruing'.¹

A debt which is attachable must be a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen.² "If land of A be held by A subject to an option in B to take it at a definite price or sum, the attachment must be of the land and not of the price. An existing debt though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due may not.³ An arrear of rent is a debt⁴ and so is money in the hands of a third person which he is bound to pay.⁵ Private pensions,⁶ annuity given not by any right of maintenance and wages of private servants,⁷ arrears of income due to married women, though restrained from anticipation,⁸ are debts when they have become due. A beneficial

Debt must be certain and perfected.

1. *Tapp v. Jones*, (1875), 10 Q.B. 591; *Subramaniam v. Arunachalam*, (1901) 25 Mad. 603 (612) P.C.

2. *Haridas v. Baroda Kishore*, (1899) 27 Cal. 38; *Webb v. Stenton*, (1883) 11 Q.B.D. 578 C.A.; *Vyse v. Brown*, (1884) 13 Q.B.D. 199; *Howell v. Metropolitan District Railway Co.*, (1881) 19 Q.B.D. 508.

3. *Tuffuzul v. Raghunath*, (1871) 14 M.I.A. 40.

4. *Mitchell v. Lee*, (1867) 2 Q.B. 259.

5. *Booth v. Trail*, (1883) 12 Q.B.D. 8.

6. *Tuffuzul v. Raghunath*, (1871) 14 M.I.A. 40; *Bhoyrub v. Madhub*, (1880) 6 C.L.R. 19.

7. *Ayyavayyar v. Virasami*, (1898) 21 Mad. 393; *Devi Prasad v. Lewis*, (1908) 31 All. 304.

8. *Hood Barrs v. Heriot*, (1896) A.C. 174. But not future income, *Hyde v. Hyde*, (1888) 13 P.D. 166 C.A.; *Re Lumley*, (1894) 3 Ch. 135 C.A.

interest in moveable property, such as the right to claim the benefit of contract for the purchase of goods, is an actionable claim and is attachable.¹

An uncertain right in unascertained property is not attachable.² An annuity terminable on the judgment-debtor ceasing to be beneficially interested will determine on its attachment and is therefore not attachable.³ So the assets of a judgment-debtor as yet unascertained, in a partnership business, which are in the hands of a receiver, cannot be treated as a debt, until the ascertainment of the share by dissolution of the partnership.⁴ The balance, though unascertained, in the hands of an agent or vendee payable to the principal or vendor, is attachable,⁵ but a debt incapable of being estimated or valued such as "all the claims of Ramnath against all his debtors" is not.⁶ The price payable to the vendor on a sale is due when the sale is complete and is then attachable,⁷ but when the price is payable on the execution of a conveyance, it is not attachable until the conveyance is executed.⁸ Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance. The non-payment of the loan does not

1. *Jaffer v. Budge Budge Jute Mills Co.*, (1905) 33 Cal. 702; *Nobin v. Kenny*, (1865) 5 W.R. Ref. 3.

2. *Beebee Tokai v. Davod*, (1865) 4 W. R. 87 see *Madho v. Ramji*, (1894) 16 All. 286.

3. *Dixon v. Rowe*, (1876) W.N. 266.

4. *Abbott v. Abbott*, (1870) 5 B.L.R. 382.

5. *Madho v. Ramji*, (1894) 16 All. 286.

6. *Tufuzzool v. Rughoonath*, (1871) 14 M.I.A. 40. See *Howell v. Met. Ry. Co.*, (1881) 19 Ch. D. 508.

7. *Harshankar v. Baijnath*, (1901) 23 All. 164; *Richardson v. Elmit*, (1876) 2 C.P.D. 9; *Howall v. Metropolitan Dist. Ry. Co.*, (1881) 19 Ch. D. 508.

8. *Ahmaduddin v. Majlis*, (1881) 3 All. 12.

constitute a debt capable of attachment.¹ A mere claim for unliquidated damages cannot be attached,² nor can liquidated damages on a verdict until judgment has been signed.³

Even an existing right under which something is accruing that will probably become a debt at some future time is not sufficient, notwithstanding that the amount to become due can be calculated with precision; so the future income of a *cestui qui* trust,⁴ the income of a married woman due after judgment,⁵ and rent not yet due⁶ are not attachable.

A salary or other periodical payment of a similar nature is as a general rule attachable when it becomes a debt and not before.⁷ Fees payable to a public vaccinator under contract are attachable as soon as the work is performed, although the time of payment may not have arrived.⁸

Where the debt is in existence, it is not necessary that it should be immediately payable.⁹ Where an existing debt is payable by future instalments, the garnishee order may become operative as each

1. *Pulchand v. Chand Mal*, (1908) 30 All. 252.

2. *Randall v. Lithgow*, (1884) 12 Q.B.D. 525; *Johnson v. Diamond*, (1885) 11 Ex. 73; *Shaw v. Shaw*, (1868) 18 L.T. 420.

3. *Jones v. Thomson*, (1858) 27 L.J. 23. See *Golam Mahomed v. Indra Chand*, (1871) 15 W.R. 34.

4. *Webb v. Stenton*, (1883) 8 B.B. 518 C.A.

5. *Bolitho & Co. Ltd. v. Gidley*, (1905) A. C. 98; *Whitley v. Edwards*, (1896) 2 Q.B. 48 C.A.

6. *Barnett v. Eastman*, (1828) 67 L.J. (Q.B.) 517.

7. *Jones v. Thompson*, (1858) E.B. & F. 63; *Hall v. Pritchett*, (1877) 3 Q.B.D. 215; *Tejram v. Kusaji*, (1870) 7 B.H.C.R.A.C. 110.

8. *Edmunds v. Edmunds*, (1904) P. 362.

9. *Syud v. Rughoonath*, (1871) 14 M.L.A. 40 (50); *S. B. Das, v. Muthia Chetty*, (1920) 12 Bur. L.T. 247=56 I.C. 948.

instalment becomes due.¹ The possibility that before the day of payment arises, the garnishee may become entitled to refuse payment is not a sufficient reason for refusing to make the order.²

If a debt exists, it is not necessary that the exact amount of the debt should be stated. If the judgment-debtor has delivered goods to a broker for sale, the sale proceeds can be attached, though the exact amount may not then have been ascertained.³ So costs ordered to be taxed and paid to the judgment-debtor may be attached before taxation.⁴ The debt may be an equitable one and therefore moneys actually in the hands of a receiver in an administration action on behalf of a legatee are attachable.⁵

A fraudulent transfer does not avail against a garnishment.⁶ If a debt due to the judgment-debtor has been fraudulently transferred, it can still be attached and the claims of the transferee can be inquired into in the court of execution.⁷

Debt beyond
jurisdiction.

Claims over which British Courts have no jurisdiction are not debts liable to be attached, but the mere circumstance that the garnishee is at the time of the application for execution beyond the limits of British India would not of itself render the debt unattachable.⁸

1. *Tapp v. Jones*, (1875) 10 Q.B. 591 ; *Re Cowan's Estate*, (1880) 14 Ch.D. 638 ; *Jones v. Thompson*, (1858) 6 W.R. 443.

2. *Sparks v. Young*, (1888) 8 I. C. L. R. 251.

3. *Madhudas v. Ramji*, (1894) 16 All. 286.

4. *Fritzpatrick v. Waring*, (1883) 13 L. R. Tr. 2.

5. *Re Cowan's Estate*, (1880) 14 Ch. D. 638 ; *Webb v. Stenton*, (1883) 11 Q. B. D. 518.

6. *Freeman on EXECUTIONS*, I. 774.

7. C.P.C., Order 21, rules 58-63.

8. *Ghamshamal v. Bhansali*, (1881) 5 Bom. 249. See also *Muthusami v. Prince Alagia*, (1903) 26 Mad. 423.

No interest is subject to execution beyond what the defendant actually owns, that is, execution is limited to that over which the defendant has disposing power exercisable for his own benefit.¹ If before the service of the writ the defendant has assigned the debt due to him, execution is of no avail. It is not essential for the purpose that the debtor (garnishee) should be notified of the assignment prior to the levy. "A draft takes precedence over the subsequent attachment, though not presented until after the writ is levied and the interest of a pledgee for shares of stock of a corporation cannot be diverted by an execution sale under a writ against the pledgor, although the pledge was not evidenced by any writing nor noted in the books of the corporation and the purchaser was without notice thereof."²

Debt must be recoverable by judgment-debtor.

The English Courts affirm "that a check drawn by a depositor against his funds in deposit in a bank does not operate prior to acceptance as an equitable assignment of any part of the fund and hence prior to that time, the drawing of the check does not prevent an effective garnishment and the rights of the garnishee are paramount to those of the check-holder whose check has not been accepted or presented. These decisions proceed on two grounds :— (i) by the drawing of the check the drawer does not part absolutely with his dominion over the fund drawn against, but may before the actual presentment or acceptance of the check, countermand his order by directing the bank not to make the payment and (ii) that the bank owes no duty to the payee of

Cheques.

1. See Freeman on EXECUTIONS, I. 472 ; *The Bank of Bengal v. Sarat Chandra*, (1919) 4 Pat. L. J. 141=48 I. C. 943.

2. Freeman on EXECUTIONS, I. 472.

the check and may refuse to accept it without incurring any liability to such payee and hence that prior to such acceptance, or until payment is made of the check, the relations between the bank and drawer remain unchanged. When these reasons do not exist the rule aforesaid must be inapplicable. If from an agreement that a check shall be received absolutely as payment or from any circumstance it appears that the amount represented by the check has, as between the parties, become the property of the payee, it cannot any longer be garnished under a writ against the drawer because by the garnishment the creditor can acquire no right which his debtor has lost."¹

"The weight of authority is to the effect that if the person having the check or draft in his possession credited the defendant in execution with the amount thereof prior to the service of the writ, so as to create between them the relation of debtor and creditor, then that the garnishment of the holder of such check or draft is ineffective and does not impose upon him any obligation to surrender it to the officer holding the execution or to collect it and pay the proceeds or any part thereof, to him and that he may on the contrary if he sees proper, collect such proceeds and pay them to the defendant in execution or make such other disposition of them as the latter may direct. One of the reasons sometimes given for denying effect to the garnishment of a bailee or holder of the check belonging to the defendant in execution is that it is uncertain whether the check will be collected and therefore that the liability of the holder of the check to such defendant is of that contingent character which is

1. Freeman on EXECUTIONS, I. 863-4.

fatal to any attempt to create a liability by garnishment proceedings."¹

The mere giving of a cheque in respect of interest due on a debenture is not a conditional payment so as to release the security and prevent the debenture-holder claiming on the non-payment of the cheque to rank as a secured creditor.² Unless the garnishee order *nisi* correctly designates the judgment-debtor and the account which he has with a bank, the bank on which the order is served need not retain the money of the customer which the order is intended to attach.³ Where a garnishee order absolute has been made against a judgment-debtor attaching the judgment-debt it operates as a stay of execution as against the judgment-creditor,⁴ but an order *nisi* is not.⁵

A debt cannot be attached when the garnishee has already given a cheque to the judgment-debtor in payment, until the cheque has been stopped⁶ or dishonoured, and the fact that the cheque has not been presented makes no difference, for the garnishee is not bound to stop the cheque.⁷ When an order attaching money payable to A and lying in the hands of a Government officer is served upon such officer, but he has already delivered a cheque to an assignee of A., the cheque becomes com-

1. Freeman on EXECUTIONS, I. 787-8.

2. In re *Defris & Sons Ltd.*, (1909) 2 Ch. 423.

3. *Koch v. Mineral Ore Syndicate*, 54 Sol. Jo. 600 C.A.

4. *Re Common*, (1880) 20 Q.B. D. 693. C. A.

5. *Re H. B.*, (1904) 1 K. B. 91 C.A.

6. *Cohen v. Hale*, (1878) 3 Q.B.D. 371.

7. *Elwell v. Jackson*, (1885) 1 T.L.R. 451 C.A.; *Bhagwandas v. Abdul Husain*, (1879) 3 Bom. 49.

pletely the assignee's property and cannot be affected by any subsequent attachment against A.¹

The debt must be one which the judgment-debtor could himself and for his own benefit² enforce.³ So if the debt is due to the judgment-debtor in the capacity of a trustee,⁴ or if he had parted with his interest by assignment,⁵ even though with a reservation for revocation,⁶ the debt cannot be attached. So too a debt due to the judgment-debtor jointly with another cannot be attached.⁷

A sum of money held by a trustee upon the trusts of a settlement, cannot be attached by a judgment-creditor of the settlor, for it is not a legal or equitable debt.⁸ When money has been paid over by a debtor to an agent for the benefit of his creditors, a judgment-creditor has no right to that money in the hands of the agent, as a debt due to the

1. *Arunachalam Chetty v. Somasundaram Chetty*, (1911) 4 Bur. L.T. 148=12 L.C. 869; *Bhagwandas v. Abdul Husain*, (1879) 3 Bom. 49; *Bence v. Shearman*, (1898) 2 Ch.D. 582.

2. *Bouch v. Sevenoakes Railway Co.*, (1879) 4 Ex. D. 133.

3. *Webster v. Webster*, (1862) 31 Beav. 393; *Chatterton v. Watney*, (1881) 16 Ch. D. 378 (381). See also *Cole v. Eley*, (1894) 2 Q.B. 350; *Badeley v. Consolidated Bank*, (1888) 38 Ch. D. 238; *Champion v. Palmer*, (1896) 2 I.R. 445 (property must be in the power of the judgment-debtor without violation of the rights of other persons).

4. *Hancock v. Smith*, (1889) 41 Ch. D. 456 C.A.; *Re Stemning*, (1895) 2 Ch. 433; *Westoby v. Day*, (1853) 2 E. & B. 695.

5. *Hirsch v. Coates*, (1856) 18 C.B. 757; *Wise v. Birkenshaw*, (1860) 29 L.J. Ex. 240; *Davis v. Freethy*, (1890) 24 Q.B.D. 519 C.A. (judgment-debt). See also *Yates v. Terry*, (1902) 1 K.B. 527 C.A.

6. *Roberts v. Jones*, (1892) 61 L.J. (Q.B.) 523; *Runtz v. Longbourne*, (1892) 8 T.L.R. 568. But the assignment may be void as fraud against creditors; see *Edmunds v. Edmunds*, (1904) P. 362.

7. *Macdonald v. Tacquah Gold Mines Co.*, (1884) 13 Q.B.D. 535 C.A.; *Beasley v. Roney*, (1891) 1 Q.B. 509.

8. *Vyse v. Brown*, (1884) 13 Q.B.D. 199.

debtor.¹ Where a judgment-debtor deposited money with his solicitor for a purpose which failed and the solicitor, when garnished, set up his claim for a bill of costs against the judgment-debtor, it was held that the debt could be attached.² But where a solicitor held a sum of money to distribute amongst creditors pursuant to a deed of arrangement which had not been registered and the debtor became at the same time liable under a judgment, it was held that the money in the solicitor's hands could not be attached as a trust had been created.³ So where a balance standing to the credit of the judgment-debtor, stockbroker, at his banker's was attached and it was proved that all the moneys in the bank were received from clients of the broker, it was held that the judgment-debtor had no right against the balance, as no part of the moneys at the bank was the debtor's own.⁴

Contingent debts cannot be garnished. No lien can be acquired upon a debt the very existence of which is dependent on a contingency for the very satisfactory reason, that there is no debt.⁵

Contingent
debts.

In every contract by one person to render service to another for a definite term and providing for payment therefor, expressly or implicitly at the expiration of such time, it can never be known, whether or not the employee will be entitled to compensation until the service is fully performed and until then the employee will have no right of action against the employer. Where a builder had

1. *Roberts v. Jones*, (1892) 40 W.R. 573 ; *Runtz v. Longbourne*, (1892) 8 T.L.R. 568.

2. *Stumore v. Campbell*, (1892) 1 Q.B. 314.

3. *Runtz v. Longbourne*, (1897) 8 T.L.R. 568.

4. *Hancock v. Smith*, (1889) 41 Ch. D. 456.

5. Freeman on EXECUTIONS, I. 809.

contracted to complete some work within a time designated according to plan delivered and stipulated to pay 3 dollars for each additional day after that day, garnishment before the completion of the work is ineffectual. Where a conductor of a street railway company was entitled to £ 8 wages, but he owed £1 for money received and had in his possession tickets for sale for £5 and it was agreed that he was required to account for them in money or by allowing their value in reduction of his wages, the company could not be garnished, because whether it owed anything or not depended upon the contingency or condition that the conductor should return the tickets in his hands. If the amount to which a contractor on a railway is entitled for work done under his contract is or may be subject to forfeiture for diverse causes specified in such contract, it cannot be garnished.¹

Claim against
Insurance
companies.

Claim against Insurance companies for losses against which they have issued policies form a prominent class of debts not liable to garnishment because subject to contingencies. Claims for loss of property destroyed by fire cannot until their adjustment be garnished, because they are mere claims for unliquidated damages. In most cases, the insurer reserves the right to repair or rebuild. In such cases until election is made, no garnishment can be made. In the case of a life-insurance, the insurer cannot be garnished during the existence of the life insured, because it is uncertain when or whether any sum will ever become due on the policy. In some cases the policy prescribes several sundry acts to be performed by the claimants, such as proofs and certificates. Until these conditions are fulfilled the

1. *Ibid.* 811-812.

liability is contingent only. But sometimes it has been thought that after garnishment the judgment-creditor can take measures to complete the cause of action against the insurer. If the property insured for is itself exempt from attachment, its substitute in value given by the insurer will also be exempt.¹

The nature of the interest in sums accruing payable under a Life Insurance Policy depends on the terms of the policy. If the terms of the policy do not purport to take away the right of the policyholder to the proceeds of the policy, he will be entitled to the sum, if payable during his life, or the sum will form part of his assets in the hands of his legal representatives if payable after death. That is, so long as there is no assignment of the policy the ownership of the policy continues in the insured himself and his creditors can follow the sum when it falls due. But if the terms of policy are such that beyond paying the premia, for instance, in the case of policies taken out under the Married Women's Property Act, 1874, the insured has no more interest in the policy and a trust is created at once in favour of the beneficiaries; the sum is not part of the insured's estate and cannot be taken in execution against him or his estate.

In *Ishane Dasi v. Gopal Chandra Dey*,² the policy was similarly effected with a Company under the provisions of the Married Women's Property Act, 1874 for the benefit of 'wife and children.' Fletcher J. said "A policy effected under the terms of the section (viz. S. 6 of the Act) by a married man coming within the terms of the section 'for the benefit of his wife or his wife and

1. Freeman on EXECUTIONS, I. 817-8.

2. (1914) 20 C. L. J. 44 = 25 I. C. 236.

children or any of them,' if they come within the terms of the section, is a complete settlement as from the date of the policy on the wife and children. Thus though there is no obligation on the husband to pay the premiums becoming due on the policy, the husband could not surrender the policy to the office and receive the surrender value thereof." The Court held that the Act was not applicable to Hindus and that the proceeds of the policy vested consequently in the representatives of the assured and formed a portion of his estate. In *Shankar Viswanath v. Umabai*¹ the policy was granted under the provisions of the same Act, for the benefit of the wife of the assured, and when a claim was preferred by the wife for the amount under the policy, the Court said that as the Act did not apply to Hindus, no trust was created in favour of the wife under its provisions and in the absence of an assignment in writing under Section 130 of the Transfer of Property Act or by signed declaration of trust under Section 5 of the Indian Trusts Act, the policy formed part of the assured's estate, "the right of action against the Company being in the executors or other representatives untrammelled by any trust in favour of his wife." In *O. G. S. Life Assurance, Limited v. Vanteddu Ammiraju*,² the policy was for the benefit of 'wife and children.' Their Lordships followed *Cleaner v. Mutual Reserve Fund Life Association*,³ in the view that apart from statute a policy in those terms could not by itself create an absolute trust in favour of the beneficiaries and held that as the Married Women's Property Act, 1874 did not apply to Hindus, the policy money

1. (1913) 37 Bom. 471.

2. (1911) 35 Mad. 162.

3. (1892) 1 Q. B. 147.

was part of the assured's estate. But later in *Balamba v. Krishnayya*,¹ the Full Bench declared that the Act of 1874 was applicable to Hindu married males and that Section 6 would validly operate in the case of Hindu policy-holders. In commenting upon the decision in 35 Mad. 162, White C. J. said "If the policy had been in the same terms as the policy in *Oriental Government Security Life Assurance Ltd v. Vanteddu Ammiraju*,² and the Company had contracted to pay the parties for whose benefit the policy was taken out, I think there would have been a trust under the section, but the person entitled to enforce the claim as against the Company would have been, not the daughter, the beneficiary, but, if no trustee had been appointed the party in whom, under the section, the legal interest vests, viz. the Public Trustee."

Property may be in the garnishee's hands in which the defendant has an interest, but the garnishee may be under no legal obligation to deliver it to him ; as the judgment-creditor can exercise no greater control over the property in such case than the defendant could, the garnishee cannot be charged. When, for instance, the garnishee holds goods of the defendant in whom is the legal title but he holds it as a trespasser, there is no object for garnishing.³

Property beyond the control of the judgment-debtor.

Money in the hands of a third person, when the relation of debtor and creditor does not exist between him and the judgment-debtor, cannot be attached.⁴ There can therefore be no garnishment

Debt not recoverable by judgment-debtor.

1. (1913) 37 Mad. 483.

2. (1911) 35 Mad. 162.

3. Freeman on EXECUTIONS, I. 778.

4. *Webb v. Stenton*, (1883) 11 Q.B.D. 518 (526) C.A.

in respect of dividends payable by a trustee in bankruptcy,¹ or by the liquidator of a company,² or in respect of money attached at the suit of the judgment-debtor,³ or money ordered to be paid by the garnishee into Court,⁴ or money in the hands of an officer of the Court, such as official receiver or registrar.⁵ A garnishee order is not operative against the trustee in bankruptcy of the judgment-debtor unless completed by receipt of the debt before date of receiving order and notice of presentation of the petition by or against debtor or commission of an available act of bankruptcy.⁶

Mortgage
debt.

Mortgage debt is not immoveable property within the meaning of Order 21, rule 54 but falls under Order 21, rule 46 (a).⁷ If the mortgage debt is sold the purchaser has the same right as the original mortgagee to sell the property as well as to enforce the personal liability.⁸ A mortgage bond, including in it a personal liability and power

1. *Prout v. Gregory*, (1889) 24 Q.B.D. 281.

2. *Mach v. Ward*, (1884) W.N. 16; see also *Spence v. Coleman*, (1901) 2 K.B. 199 C.A. In *Klauber v. Weill*, (1901) 17 T.L.R. 344 C.A., the liquidator did not object to the order.

3. *Cooper v. Lawson*, (1890) 6 T.L.R. 34.

4. *Re Greer*, (1895) 2 Ch. 217; *Howell v. Metropolitan District Railway Co.*, (1881) 19 Ch. D. 508.

5. *Lewellyn v. Rowland*, (1907) 47 L.T. 433; *Dolphin v. Layton*, (1879) 4 C.P.D. 130; *Re Greensill*, (1872) 2 C.P. 24. See *Spence v. Coleman*, (1901) 2 K.B. 199 C.A.

6. Vaughan Williams on BANKRUPTCY, 8th Edn., 237; see also Presidency Towns Insolvency Act, (III of 1909) and Provincial Insolvency Act, (V of 1920).

7. *Nataraja v. South Indian Bank, Tinnevely*, (1911) 37 Mad. 57; *Subramania v. Subba*, (1912) 16 I.C. 816; *Shah Mohammad v. Lachminarain*, (1918) 21 O.C. 400=50 I.C. 157; *Chullile Peetikayal Mammad v. Othenam Nambiar*, (1914) 27 M.L.J. 239=26 L.C. 508. See contra, *Sewa Ram v. Dhara Shah*, (1913) P.W.R. 79=18 I.C. 318.

8. *Taravadi v. Bai Kashi*, (1902) 26 Bom. 305.

to sell mortgaged property in default of redemption constitutes a debt, and is liable for attachment as a debt and not as immoveable property.¹ The interest of a usufructuary mortgagee in the mortgage can be attached; if there is a debt recoverable at the time from the mortgagor it can be attached as a debt by a prohibitory order² and if there is no debt so payable, his interest as such mortgagee in immoveable property can be attached.³

“ A judgment-creditor may be a debtor of the defendant in execution and entitled to maintain an action at law against him for the amount of the debt. It has nevertheless been insisted that judgment-creditor cannot garnish a debt due from himself to the defendant on the ground that garnishment is an adversary proceeding, to be made effective, if necessary, by an action brought by the judgment-creditor against the garnished creditor of the defendant and that the plaintiff cannot bring an action against himself to enforce his garnishment of himself, although the debt may be owing from him in a representative capacity, for instance, as an administrator or executor from whom the defendant in execution was entitled to receive the payment of a debt. These technical objections are difficult to answer, but without answering have often been overruled.”⁴

Debt due by judgment-creditor.

1. *Debendra v. Ruptal*, (1886) 12 Cal. 546; *Kasinath v. Sadasiv*, (1893) 20 Cal. 805; *Karimunissa v. Phul Chand*, (1893) 15 All. 134; *Baldev v. Ramachandra*, (1895) 19 Bom. 121; *Tarvadi v. Bai Kashi*, (1902) 26 Bom. 305; *Muniappa v. Subramanya*, (1895) 18 Mad. 457; *Nataraja v. South Indian Bank*, (1910) 37 Mad. 51.

2. *Chullile v. Othenam*, (1914) 27 M.L.J. 239=26 I. C. 508; *Ramasami v. Srinivasa*, (1916) 39 Mad. 389.

3. *Manilal v. Motibhai*, (1911) 35 Bom. 288.

4. *Freeman on EXECUTIONS*, I. 798.

Debt due by a
co-judgment-
debtor.

“ If one of the several judgment-debtors happen to be indebted to the others, he cannot be garnished on account of such debt because he is not a third person within the meaning of the American statutes. The denial of such right might with equal propriety be sustained on the ground that such garnishment is a vain act. The only result which could follow from its allowance would be a judgment against such debtor for the amount of the debt due from him to his co-judgment-debtors. But the plaintiff has already a judgment against him and with like diligence may make one judgment as efficient as two, because the second judgment would not entitle the judgment-creditor to seize any property not equally open to levy under the first.”¹

Debts in suit.

“ The mere pendency of a suit for the collection of a debt will not place it beyond the reach of garnishment process. The general rule is this: As long as the proceedings are in such a condition that the defendant, by a plea in abatement or otherwise, can bring before the Court the fact that the debt in suit is attached by a creditor of the plaintiff and can then shield himself from the liability to make payment both to the plaintiff and to the plaintiff's creditor, so long as the defendant may be summoned and held as a garnishee. But when this state has been passed, the liability of the debt to garnishment is in most of the states terminated. So a debt in suit cannot be attached after a verdict, after default or after an award therefor made by a referee.”²

Judgment-
debt.

Judgment-debts or debts of record can in England be sued upon as creating a debt between

1. Freeman on EXECUTIONS, I. 856.

2. Freeman on EXECUTIONS, I. 825—6.

the parties whether or no the Court be a court of record,¹ but in India such debts merge into the decree,² and are recoverable only as provided by the Code.³ The terms 'debt' includes a judgment debt for the purposes of limitation.⁴ Decree is property.⁵

It is essential that the obligation existing against the garnishee in favour of the defendant should be payable in money. Therefore a demand payable in store accounts, notes, saddlery, castings, in work or labour, in groceries and provisions as called for, cannot be reached by garnishment. In these cases the Court cannot compel the garnishee to pay a certain sum of money into Court, for that would be to compel him to change a contract for the delivery of specific property or the performance of specific services into a contract to pay money. When a party owing a debt has the option to pay it in specific articles rather than in money, this option continues until a demand for payment has been made, without resulting in any compliance therewith. Before such demand, the obligation cannot be garnished.⁶

Every kind of interest, except that of which the transfer is prohibited by law,⁷ in real property is liable to be taken in execution. Real property.

1. Anson on CONTRACTS (9th Edn.) 374.

2. *Periasami v. Krishna*, (1901) 25 Mad. 431 (442).

3. C.P.C., O. 21, r. 53. *Maung Lun Bye v. Maung Po*, (1923) 2 Bur. L.J. 151 (money decree cannot be sold in execution).

4. *Rahmit v. Satgur*, (1880) 3 All. 247 F.B.; *Jankiprasad v. Ghulam*, (1882) 5 All. 201; *Fateh Muhammad v. Gopal*, (1885) 7 All. 424; *Muhammad v. Payag*, (1894) 16 All. 228; *Roshan v. Mata Din*, (1903) 26 All. 36.

5. *Gholam v. Indrachand*, (1870) 15 W.R. 34.

6. Freeman on EXECUTIONS, I. 804-5.

7. See for instance, Transfer of Property Act (IV of 1882), S. 6.

Lands.

Lands may be taken in execution notwithstanding a holding thereof adversely to the judgment-debtor, if the latter still retains a right of re-entry.¹ And mere possession without title is recognised and protected by law against all but the true owner and is subject to execution.² The purchaser of such interest gets the right to enter and enjoy the possession to the same extent as it could have been enjoyed lawfully by the judgment-debtor,³ and is entitled in law to tack on the length of his own possession to that of the judgment-debtor, to whose place he steps in.⁴ Property of which the judgment-debtor has been in possession for 12 years after he had filed his petition in insolvency becomes his by adverse possession and as such attachable.⁵

Interest of co-tenant.

The interest of a co-tenant is liable to execution, though it is always liable by a suit in partition to be changed from a moiety of the whole lands of a co-tenancy to an estate in severalty in some specific part thereof or to be entirely diverted by a partition sale. The general rule is that the unascertained interest of the co-tenant in the common property may be attached and that a levy by sale of the debtor's interest in a specific part of the lands cannot be sustained.⁶ "If however a levy is made

1. See *Suja Hossein v. Monohur*, (1896) 24 Cal. 244; *Goturi Sunkur v. Abhoyessury*, (1896) 1 C.W.N. xiv, *Mata Prasad v. Mt. Andan Kuar*, (1899) 3 O. C. 215.

2. See Specific Relief Act (I of 1877), S. 9 and Indian Limitation Act (IX of 1908), Art. 144; See *Goluck Chunder v. Nundo Coomar*, (1878) 4 Cal. 699; *Wajib Khan v. Darghi Khan*, (1906) 9 O. C. 161 (such a right is heritable).

3. Freeman on EXECUTIONS, II. 897.

4. *Harjivan v. Shivram*, (1894) 19 Bom. 620; *Ali Sahab v. Kaji Ahmed*, (1891) 16 Bom. 197; *Gossain v. Issur Chunder*, (1877) 3 Cal. 224.

5. *Suja Hossein v. Monohur*, (1896) 24 Cal. 244.

6. Freeman on CO-TENANCY AND PARTITION, Sec. 216.

upon the interest of a co-tenant in an entire parcel of land, it will be sustained, although the same parties are also co-tenants of other parcels of land, all of which might have to be united in one suit for partition. For the purposes of sale and conveyance whether voluntary or involuntary, each distinct parcel of land is treated as forming the basis of an independent co-tenancy."¹ The right, title and interest of one Hindu co-sharer in joint estate may be attached and sold in execution to satisfy a decree against him and the purchaser at such a sale acquires only the right to compel a partition of such share as the judgment-debtor possessed.² It is within the power of the Court in effecting partition, if in its opinion it can be done with due regard to the interests of the other co-parcener, to allot to the share of one co-parcener the property which that co-parcener has alienated to a third party and the Court will endeavour to do so.³

When the mortgagor has failed to give possession of the mortgaged property to the usufructuary mortgagee, the right of the mortgagee for possession against the mortgagor is an actionable claim and is attachable.⁴

Interest of mortgagee.

The interest of a judgment-debtor in property held under a contract of sale is mere equity and cannot be attached, for an agreement of sale creates no interest in or charge on the property agreed to be sold.⁵ But the right to compel

Property held under contract of sale.

1. Freeman on EXECUTIONS, II. 892-3.

2. See Vol. I. 576-8.

3. *Munusami v. Veerabadra*, (1907) 17 M.L.J. 617 ; *Dhanoo-mal v. Mt. Kaim Khatun*, (1907) 2 S.L.R. 43.

4. *Rani v. Ajudhia*, (1894) 16 All. 315 F.B.

5. Transfer of Property Act (IV of 1882), S. 54. See *Peer Mahomed Devji v. Mahomed Ebrahim*, (1904) 29 Bom. 234 ; *Sheoram v. Lalman*, (1899) 13 C.P.L.R. 163.

specific performance of the contract to sell is an actionable claim and can as such be taken in execution,¹ but the latter is only a personal right against the vendor or his assignee with notice.² Under the law of England, the purchaser, under a contract of sale, is regarded as the equitable owner of the property from the date of the contract.³ The law in America is to a similar effect. When the vendee has made full payment and was entitled to immediate conveyance he was regarded as a *cestui que trust* for whom and to whose use the vendor was seized; but when the whole price has not been paid, he may not be so and has no beneficial interest attachable in execution.⁴ These principles have now been accepted and followed in India, so that a contract of sale even when accompanied by delivery of possession creates a right to resist an action on title for possession notwithstanding any considerations of equity.⁵

Property contracted to be sold.

“The interest of a vendor who has not yet conveyed a title to his vendee may be sought either when he has given possession and received full

1. *Rudra v. Krishna*, (1887) 14 Cal. 241.

2. *Mahadeo v. Vasudev*, (1898) 23 Bom. 181; *Charamudi v. Raghavulu*, (1915) 39 Mad. 462.

3. Sugden on VENDORS AND PURCHASERS (14th Edn.), 186.

4. Freeman on EXECUTIONS, II. 995.

5. *Hormasji v. Keshav*, (1893) 18 Bom. 13; *Karalia v. Mansukhlram*, (1900) 24 Bom. 400; *Begam v. Muhammad*, (1884) 16 All. 314; *Ram Balsh v. Maghland*, (1903) 26 All. 266; *Venkatesh v. Mallappa*, (1922) 46 Bom. 722; *Gangaram v. Larman*, (1916) 41 Bom. 498; *Santhoyi Ammal v. M. K. Mahomed*, (1922) 11 L.B.R. 94=65 I.C. 405; *Vizagapatam Sugar Development Co. v. Muthurama Reddy*, (1923) 46 Mad. 919; *Puchha Lal v. Kunj Behari Lal*, (1913) 19 C.L.J. 213=20 I.C. 803; *Khagendra Nath v. Sonatan Guha*, (1915) 20 C.W.N. 149=31 I.C. 987. See also *Mahomed Musa v. Aghore Kumar*, (1915) 42 Cal. 801; *Jnan Chandar v. Rajani Kanta*, (1917) 22 C.W.N. 522=41 I.C. 850; *Gajendranath Dey v. Moulvi Ashraf Hossain*, (1922) 27 C.W.N. 159=69 I.C. 707.

payment for the property and has therefore no beneficial interest therein or when though under a binding contract to sell and convey, full payment has not been made and he yet retains the legal title as security for the payment of his purchase money. In either case, it is quite clear that, if the property is subject to execution at all, the title acquired by the purchaser at the execution sale, with notice of the prior contract of sale, must be subordinate thereto and that the fact that the purchaser is in possession under a contract constitutes sufficient notice thereof, but it may be insisted that as there remains the legal estate in the vendor, it passes by the execution sale, leaving the vendee to assert his rights by some equitable proceeding. The prevailing opinion however is that when the vendor retains no beneficial interest, the property is not subject to execution against him and a purchaser with notice actual or constructive, does not even obtain a legal title, or at least, that he may be defeated on his bringing an action at law, although the vendee interposes no equitable defence. *** If the vendor has received partial payment and retains the title as security for the balance, the case seems, on principle, to be essentially different. For, in that event, he had both the legal title and beneficial interest therein. According to better opinion his interest may be taken in execution, subject to the rights of the vendee under a contract of sale. *** If the vendor had parted with his legal title but retains a lien to secure the payment of the balance of the purchase price, he has no interest in the property which is subject to execution as real estate. If parties in contemplation of the sale and purchase of real property, execute a conveyance thereof, and promissory notes for the

purchase price are left, both the conveyance and the notes, in the hands of a third person, to be delivered when the vendor had produced an abstract of title, and the title, as therein disclosed, should be approved by the depository, the interest of the vendor remains subject to execution until the contingency has happened, under which a delivery of the deed was authorised ; for, until that time, the vendor has not parted with any interest in the property, either legal or equitable.”¹

Property
pending
confirmation
of court sale.

The interest of a judgment-debtor in his property after sale in execution, until the sale is confirmed, is attachable. During that period, he has beneficial as well as a legal estate in it, capable of transfer by voluntary disposition and leviable therefore in execution.² The interest of purchaser at court-sale pending confirmation of sale is not of an uncertain character³ and is attachable, for when the sale becomes absolute the property is deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.⁴ From the date of sale the auction-purchaser has a good equitable or inchoate title to the property sold and when the sale is confirmed that title becomes complete and relates back to the date of the sale so as to enable him to

1. Freeman on EXECUTIONS, II. 924-8.

2. *Appaya v. Kunhati Beari*, (1906) 30 Mad. 214 ; *Manikka v. Rajagopala*, (1907) 30 Mad. 507. See *Bhawani Kunwar v. Mathura Frasad*, (1912) 40 Cal. 89 ; *Anantha Lakshmiammal v. Kunnanchand Karth Sankaran Nair*, (1913) 24 M L.J. 205=18 I.C. 579. Freeman on EXECUTIONS, II. 928 ; but see contra, *Hazari-ram v. Badairam*, (1897) 1 C.W.N. 279. (Under C.P.C., O. 21 r. 89 as to right to set aside sale).

3. *Bhawani Kunwar v. Mathura Frasad*, (1912) 40 Cal. 89 ; *Zalim v. Kallu*, (1907) 10 O.C. 273.

4. C.P.C., S. 65. See also Freeman on EXECUTIONS, II. 994.

maintain an action for injury to the property caused in the interval.¹

A leasehold interest is liable to be sold in execution, though the lease contains terms forbidding assignment or underletting and providing for re-entry on forfeiture; such a prohibition applies only to voluntary alienations and not to assignments by operation of law, taking effect *in invitum*, as a sale under an execution.² "A lease is not forfeited," says Freeman "by any transfer made by operation of law, included in which are sales under execution, unless it is apparent that such sales were brought about by the tenant for the purpose of evading the creditors of the lessee against transfer thereof. To hold otherwise is in effect to permit the creation of valuable interest in houses which may be held by them in defiance of the demands of their creditors. On the other hand it may be argued that a landlord by inserting a covenant of this character in his lease, shows that he intends to deal with the lessee personally and is unwilling to accept others as his tenants and to permit them without his consent, to occupy his property and to enforce against his protest a sale of the tenant's interest under execution is to require him to accept a new tenant contrary to the stipulations under his lease and to suffer the great

1. *Adhur Chunder v. Aghore Nath*, (1898) 2 C.W.N. 589; *Bhawani v. Mathura Prasad*, (1907) 7 C.L.J. 11; *Radha Kishun v. Hemchandra*, (1907) 11 C.W.N. 995; *Banke Lal v. Jagatnaraian*, (1900) 22 All. 168. See also *Yeshwant v. Govind*, (1886) 10 Bom. 453; *Chintamanrow v. Vithabai*, (1887) 11 Bom. 588.

2. *Vyankatraya v. Shivrambhat*, (1883) 7 Bom. 256 (Mulgeni-tenure); *Golak Nath v. Mathura Nath*, (1891) 20 Cal. 273; *Wazir v. Har Prasad*, (1912) 13 I.C. 613; *Keshab v. Ajadhar*, (1914) 18 C.W.N. 1182=28 I.C. 237; *Promode Ranjan v. Aswini Kumar*, (1914) 18 C.W.N. 1138=26 I.C. 23; *Shamsuddin v. Shaikh Amir*, (1895) 9 C.P.L.R. 134. See also *Doe d. Mitchinson v. Carter*, (1798) 8 Term Rep. 57.

loss which may result to him from the diminution in value of the leased premises, through the bad faith or inefficient character of such substituted tenant”¹

Tenures.

A tenant's hereditary and beneficial interest can be sold,² but an occupancy tenure not transferable by custom or usage is not saleable in execution except under the Rent Acts.³ Where a judgment-debtor has erected and occupied a mud-house for fifty years without reservation by the landholder for ouster, that interest is saleable⁴

Other
interests in
land.

Property, though the subject of a suit is attachable, though the Court would order its sale at the fittest time.⁵ A vested remainder,⁶ a resulting trust,⁷ or the equity of redemption of the mortgagor in mortgaged property⁸ is attachable. So is a lease for a term of years⁹ or from year to year or a rent-charge,¹⁰ or a right to get back land from the donee.¹¹ A beneficial interest under a trust can

1. Freeman on EXECUTIONS, I. 495-6.

2. *Ramessur v. Golamee*, (1875) 24 W.R. 309.

3. *Biram v. Gopikanth*, (1897) 24 Cal 355; *Durgacharan v. Kaliprasanna*, (1899) 26 Cal. 727; *Madan Lal v. Sayad Muhammad*, (1906) 28 All. 696; *Ram Sarup v. Kishen Lal*, (1907) 29 All. 327.

4. *Doorga Pershad v. Brindabun*, (1871) 15 W.R. 274.

5. *Ramachunder v. Nund Lal*, (1873) 19 W.R. 132.

6. *Annaji v. Chandrabai*, (1893) 17 Bom. 503. See *Lachman Prasad v. Baldeo Prasad*, (1919) 21 O.C. 312=48 I.C. 398.

7. *Antoo v. Ardeshir*, (1899) 1 Bom. L.R. 203. For resulting trusts, see Indian Trusts Act (II of 1882) Chap. IX and for interest in trust funds, *Abdul Latcef v. Dentre*, (1889) 12 Mad. 250.

8. *Farashram v. Gebind*, (1889) 21 Bom. 226; *Saraswati v. Nabadwip*, (1870) 5 B.L.R. 450; *Bhuggobutty v. Shamachurn*, (1876) 1 Cal. 337. See *Whitworth v. Gangin*, (1844) 3 Hare 416; *Munraj v. Deen Dyal*, (1874) 20 W.R. 20.

9. *Johns v. Ink*, (1900) 1 Ch. 296.

10. See *Bandhulalli v. Lagin*, (1917) 36 I.C. 1006.

11. See *Wotton v. Shirt*, (1600) Cro. Eliz. 742.

be attached' when the trust is clear and simple,² but not when the trust is also for the benefit of another person.³

A naked legal title, as that of a trustee, cannot be taken in execution but a legal title if accompanied by some beneficial interest can be taken.⁴ If the judgment-debtor has received the property for the purpose of immediately conveying it to another and does so convey it—the two deeds being really parts of the same transaction—he has never had anything beyond an instantaneous seisin and his interest is not subject to execution. So where the vendor and vendee agree upon a sale and purchase of land and that simultaneously with the execution of the conveyance, a mortgage shall be executed for the purchase price or some part thereof, the two instruments when so executed are regarded as one and there is no intervening period between the conveyance and the mortgage, in which an execution lien or levy can attach and obtain precedence over the mortgage.⁵

Attachment of property includes attachment of the profits thereof, but if after attachment the original owner is allowed to remain in possession of the property, the profits from the moment they find their way in to the owner's pocket cease to be liable for the debt.⁶ Profits that have accrued due to a cosharer in Zamindari property and are recoverable from the lambardar are but future pro-

1. *Rudra Perkash v. Krishna Mohun*, (1886) 14 Cal. 241.

2. *Forth v. Norfolk, (Duke)* (1820) 4 Madd. 503.

3. *Doe d. Hull v. Greewhite*, (1821) 4 B. & Ald. 684; See *Tyrell v. Painton*, (1895) 1 Q.B. 202-C.A.

4. See *Whitworth v. Gangain*, (1844) 3 Hare 416; *Potts v. Warwick and Birmingham Canal New Co.* (1853) Kay. 142.

5. FREEMAN ON EXECUTIONS, II. 895-6.

6. *Ram Cocmar v. Gobind Nath*, (1869) 12 W.R. 591.

fits and are not attachable.¹ A creditor of Bungahi is not entitled after his death to attach share of offerings made to his heir after Bungahi's death, as the same cannot be treated as property inherited by the heir.²

Wearing
apparel.

Necessary wearing apparel is exempt.³ Wearing apparel consists of garments worn to protect the person from exposure and not articles used for ornament merely and includes cloth and trimmings purchased and about to be used for the purpose of being made into clothing. 'Necessary' is "not to be understood in its most rigid sense implying something indispensable but as equivalent to convenient and comfortable. It would therefore include such articles of dress or clothing as might properly be considered among the necessities in contradistinction to the luxuries of life. Whether an article attached is necessary or a luxury may under some circumstances be a question for the jury, depending on the situation of the debtor, the character and uses and perhaps the cost of the article." It is the better opinion that a watch is not exempted, though some States in America allow an exemption, as household furniture or as working tool or as wearing apparel.⁴ The neck-ornament, *mangalasutra*, worn by a married woman, during the life-time of her husband is regarded as necessary wearing apparel exempt from attachment.⁵ Though the Hindu Law concedes to the husband a personal right of user, ornaments on the person of a Hindu wife cannot be

1. *Shiv Singh v. Sri Ram*, (1908) 30 All. 246.

2. *Rikha Mal v. Balwant Singh*, (1917) P.L.R. 126=42 I. C. 390.

3. *Set Gangaram v. Parbhu*, (1872) 9 B.H.C. 272.

4. *Freeman on EXECUTIONS*, II, 1238-41.

5. *Appana v. Tangamma*, (1884) 9 Bom. 106.

attached in execution of a decree against her husband.¹ Cloths, equipment and arms of a person subject to the Indian Marine Act are exempted under that Act.²

Tools of artisans cannot be seized in execution. The expression is not the 'tools' of *debtors* or 'tools of trade' but of '*artisans*.' So when the debtor is not an artisan, his tools cannot be saved. Artisan means a mechanic. Opinions differ whether a dentist is a mechanic, but a photographer is not. A photographer is "an artist not an artisan, who takes impressions or likenesses of things or persons on prepared plates or surfaces. He is no more a mechanic than the painter, who by means of pigments covers his canvas with the glaring images of natural objects."³ In America the type-writing, *sewing* and printing machines of a type-writer, tailor and printer and the library of a lawyer are not saved from attachment. But a barber may be deemed an artisan,⁴ but it must be seriously doubted whether barbers, who carry on a big trade in haircutting, can claim an exemption for all the furniture etc., that they keep in their saloons.⁵ In India, a sewing machine has however been exempted as an artisan's tool.⁶ The word 'tool' is ordinarily understood as designating something of a simple nature and comparatively free from complication.⁷ Because a mechanic employs an assistant or appren-

1. *Tukran v. Gunaji*, (1871) 8 B.H.C.A.C. 129.

2. See Act XIV of 1887, S. 81.

3. Freeman on EXECUTIONS, II. 1214-16.

4. He is a village artisan (or village servant). See Mad. Act III of 1895, section 3 (4).

5. Freeman on EXECUTIONS, II. 1214.

6. *Vithoba v. Babu Lal*, (1922) 65 I.C. 416.

7. Freeman on EXECUTIONS, II. 1212.

tice it does not make him a manufacturer, nor does it necessarily follow that the tools used by the assistant are subject to execution, for the tools used by the principal and the assistant may not, on the aggregate, exceed the material ordinarily required in carrying in the trade.¹

Agriculturist.

An agriculturist is "a husbandman, one engaged in the tillage of the ground and making a living by it."² The term must be construed in the strictest sense as applying to a person who earns his livelihood wholly or principally by agriculture.³ It is not confined to persons who cultivate land in which they have an interest either as proprietors or tenants, but extends to all persons engaged in the cultivation of land.⁴

A person does not cease to be an agriculturist because he transferred his land by lease or mortgage &c. and his property is protected from attachment.⁵ Where the judgment-debtor's only source of living is not by cultivation of land, he is not an agriculturist.⁶ When an applicant for insolvency possessed a zamindari as well as cultivated land and placed the whole property at the disposal of the Official Receiver for distribution among creditors, he cannot object after the zamindari was sold that he is an agriculturist and his house cannot be sold, because at the date of

1. Freeman on EXECUTIONS, II. 1209.

2. *Banda Gurbaksh v. Ghulam*, (1897) 47 P.R. 1897. Freeman on EXECUTIONS, II. 1199.

3. *Govind v. Ramakrishna*, (1888) 12 Bom. 363 ; *Ganpatram v. Lakshman Rao*, (1900) 13 C.P.L.R. 30 ; *Rubine v. Balwantrai*, (1923) Bom. 12.

4. *Devara Hedge v. Vaikunt Subaya*, (1917) 41 Bom. 475.

5. *Atmolaksao v. Eknath*, (1920) 16 N.L.R. 89=55 I.C. 481.

6. *Surangini Deby v. Kedarnath*, (1921) 63 I.C. 681.

the application, his chief source of income was the zamindari and not agriculture¹

The implements of husbandry of an agriculturist are not attachable. They are "such utensils or implements as are needed and used by the farmer in conducting his own farming operation." Articles used for making jaggery are within this description.² It was said in America² "it was not intended that all farming machinery which a farmer may own should be exempt, because while he has it chiefly for renting it out or in doing work on other farms for hire, he still uses it to a small extent on his own land. To hold otherwise would enable the farmer who cultivates forty acres to invest a large amount of money in expensive implements and to hold them free and clear of his creditors, though they were used but for a day on his own land, and for all the balance of the year were rented or hired out to others. A reasonable construction should be given to the statute and not one which would prevent its benevolent design and enable gross frauds to be perpetrated under the color of law." But in later cases a more liberal construction was adopted and it was said that "If a Statute does not impose any restriction upon the value of the implements, which are by it declared to be exempt from execution, the courts are powerless to create one. Hence a combined harvester, a machine of great value, which at the same time cuts and threshes grain, is exempt under a statute exempting *farming utensils and implements of husbandry*" and "it would be a hard rule upon the debtor to hold that although the

His implements.

1. *Tej Singh v. Banwan Lal*, (1918) 15 A. L. J. 540=40 I. C. 544.

2. *Lakshman v. Narhari*, (1923) 25 Bom. L.R. 1211.

property was necessary to carry on his farming he would forfeit the exemption should he seek to earn something with it, after he had ceased to need it for his own farming.”¹

His cattle and seed-grain.

Cattle and seed-grain of agriculturists are not absolutely free from attachment. The provision for exemption is only intended for the benefit of indigent agriculturists and an attachment of such cattle and seed-grain is perfectly valid, especially when the judgment-debtor is able to replace them without much inconvenience.² It is the function of the executing Court to see whether the cattle are or are not necessary to enable the agriculturist to earn his livelihood.³

His house.

Houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him are not attachable. Under the Code of 1882, only the materials of houses and other buildings belonging to agriculturists were exempted,⁴ but it was held that the exemption covered any house in the physical occupation of an agriculturist or his representatives after his death, for the purposes of his agricultural calling.⁵ To invoke the privilege, the building must belong to and be occupied by the agriculturist, that is, must be ‘lived in by’ or ‘used for agricultural purposes’ by the judgment-debtor.⁶

1. See Freeman on EXECUTIONS, II. 1220-21.

2. *Chakravarthi v. Ammayappa*, (1914) 1 L.W. 519=25 I.C. 117.

3. *Qul Mahomed v. Faiz Mahomed*, (1920) 13 S.L.R. 210=56 I.C. 69; *Ghurey v. Sanwalia*, (1921) 61 I.C. 777.

4. Act V of 1882, S. 266 (c).

5. *Radhakrishan v. Balvant*, (1883) 7 Bom. 530. See also *Jivan v. Hira*, (1888) 12 Bom. 363.

6. *Attar Singh v. Bhagwan*, (1909) P R. 65=2 I.C. 983,

The town residence of an agriculturist is not therefore protected.¹

In determining whether a house is exempt from attachment, the requirements of the agriculturist must be judged not with reference to the number of buildings which he has kept in recent years (for he may have been subletting a portion of the land in the recent years), but with reference to the possibility of his cultivating the whole of the area himself. It is sufficient if the house is occupied for agricultural purposes.² Where a judgment-debtor owned two houses, in one of which he resided and in the other he kept his implements and one of the houses was attached, it was held that that the house belonged to an agriculturist and was not therefore saleable.³ A vacant site used by an agriculturist for storing manure and fodder with no building erected thereon does not come within section 60 which is confined to house and other buildings.⁴ The superstructure of a house belonging to a Bhag in a Bhagdari village is exempt from attachment under the Bhagdari Act.⁵

Where a decree-holder is prohibited from attaching the building of an agriculturist, he cannot claim rateable distribution in the proceeds of the materials of the building realised at the suit of the judgment-debtor's landlord, for a man cannot be allowed to share in the result of an execution sale of property, which

1. *Maneck Lal v. Manilal*, (1905) 7 Bom. J.R. 685.

2. *Bhaiyalal v. Ballabhadras*, (1913) 15 N.L.R. 83=51 I.C. 129 (There is no connection between clause (h) and clause (j) of section 60.).

3. *Shafion v. Mamidullah* (1916) 14 A.L.J. 240=33 I.C. 727. See also *Bhaiyalal v. Ballabhadras*, (1919) 15 N.L.R. 833=51 I.C. 129.

4. *Jahangir Singh v. Hira*, (1917) P.L.R. 21=39 I.C. 92.

5. Bom. Act II of 1862. *Collector of Broach v. Venilal*, (1896) 21 Bom. 588.

he could not have himself taken in attachment and sale under his own decree.¹

The agriculturist must claim the exemption of the building at the time of the attachment and sale, and if he does not then do it, he cannot resist a suit for possession on that ground after the sale by the purchaser.² The burden of proving the necessary qualification entitling judgment-debtor to the exemption is on him.³ Where therefore a person, who is both a Zamindar and a cultivator, wants to have his house exempted from attachment on the ground that it is a house of an agriculturist, he must prove that the main source of his income is from cultivation and that he is an agriculturist in the strict sense of the term.⁴

In *Jankidas v. Sandal*,⁵ the full Bench of the Allahabad High Court held that the sale of a house of an agriculturist if it had been specifically mortgaged is not illegal unless he is prohibited by law from mortgaging or selling it. The exemption in this section 60 of the Code enacted against attachment does not apply to mortgage decrees and the house of an agriculturist, not being a house appurtenant to his holding can be validly mortgaged, and be sold in execution of a mortgage decree. But if the house is so appurtenant, it cannot be sold.⁶

1. *Maniklal v. Lakha*, (1880) 4 Bom. 429. See also *Bithal v. Ram Kishore*, (1900) 23 All. 106.

2. *Pandurang v. Krishnaji*, (1903) 28 Bom. 125. See also *Uzir Biswas v. Haradeb Das*, (1920) 24 C.W.N. 575=57 I. C. 249; *Lala Ram v. Thakur Prasad*, (1917) 40 All. 680.

3. *Ibid.* *Ashmatullah v. Ram Mahomad*, (1915) 20 C.W.N. 874=30 I.C. 343.

4. *Jamna Prasad v. Raghunath*, (1913) 35 All. 307.

5. (1911) 24 All. 25 F. B. ; *Bhogwandas v. Hathibhai*, (1879) 4 Bom. 25 ; *Jankidas v. Sandal*, (1915) 13 A.L.J. 846=30 I.C. 549 ; *Nirbhay Lal v. Kallan*, (1918) 45 I. C. 646. See also *Budhi Mal v. Bhati*, (1911) 9 I.C. 823.

6. *Niadar v. Sapit Khan*, (1920) 51 I.C. 553.

Right to sue
for damages.

A mere right to sue for damages is not attachable.¹ To 'sue' implies the taking of any legal proceedings in matters of any kind and does not necessarily imply institution of a suit by means of a plaint referred to in the Code of Civil Procedure.² The object of the prohibition is to discourage trafficking in speculative litigation, bordering on the precincts of champerty and maintenance. Accordingly it has been held that a right to sue to set aside a sale,³ to recover mesne profits,⁴ to recover compensation for the wrongful attachment of moveable property in execution,⁵ to recover damages from an agent,⁶ and a right to appeal,⁷ cannot be transferred. So is a claim for damages for breach of contract after breach,⁸ even though the breach was in respect of the discharge of an obligation binding on the transferee,⁹ or for use and occupation after the

1. See *Taffazul v. Raghunath*, (1871) 14 M.I.A. 40; *Ali Muhammad v. S. C. Chunder*, (1909) 36 Cal. 345; *Prasanna Kumar v. Asutosh*, (1913) 18 C.W.N. 450=20 I.C. 685; *Shakrulkh v. Sheo Prasad*, (1918) 4 O.L.J. 425=41 I.C. 434; *Gopala v. Ramaswami*, (1910) 21 M.L.J. 153=6 I.C. 290; *Gopala Iyer v. Ramaswamy Sastrigal*, (1911) 22 M.L.J. 207=10 I.C. 320; *Nakhola v. Kokayya*, (1923) 69 I.C. 238; *Gordhandas v. Firm of Gokal Khatoo*, (1924) 78 I.C. 409.

2. *Rama v. Shamrao*, (1904) 7 Bom. L.R. 135.

3. *Carapiet v. Panna Lal*, (1870) 14 W.R. 152.

4. *Shyamchand v. Land Mortgage Bank of India*, (1883) 9 Cal. 695; *Kocherla Setamma v. Pillala Venkatramayya*, (1913) 38 Mad. 308; *Durgachandra v. Koilashchandra*, (1898) 2 C.W.N. 43. See *Chidambaram v. Doraiswami*, (1915) 31 I.C. 473 but not for arrears of rent; *Kawtha Suryanarayana v. Yaruāala Venkayya*, (1923) 70 I.C. 38.

5. *Pragi Lal v. Fatehchand*, (1883) 5 All. 207.

6. See *Varahaswami v. Ramachandra*, (1913) 38 Mad. 138.

7. *Bipro Pratap v. Denarain*, (1865) 3 W.R. Mis. 16; *Golam v. Indrachand*, (1867) 15 W.R. 34.

8. *Janglimal v. Pioneer Flour Mills*, (1914) P.R. 106=27 I.C. 115. See also *Hirachand v. Nemchand*, (1923) 47 Bom. 719.

9. *Govindaswami v. Ramaswamy*, (1916) 20 M.L.J. 492=34 I.C. 6, on appeal from (1915) 31 I.C. 604.

lease expired.¹ A right to recover goods is a personal claim and cannot be transferred. Where the document provides for damages in case the goods are not returned, a claim for damages is a mere right to sue.² Where a mortgagee does not pay the consideration in full, the mortgagor can only recover damages for non-performance of the contract and the balance due from the mortgagee is not a debt.³

Actionable
claim.

But an actionable claim or a chose in action if it includes any substantial interest beyond a mere right to litigate, can be the subject of a valid transfer,⁴ and as such of attachment in execution. An actionable claim means a "claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property or to any beneficial interest in moveable property not in possession, either actual or constructive of the claimant which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent".⁵ To constitute an actionable claim, the matter must be one in respect of which a cause of action has already arisen and which subject to procedure is ready to be enforced by suit.⁶

A claim for specific performance of an agreement to sell,⁷ the right under a contract for the pur-

1. *Gopala v. Ramaswami*, (1910) 21 M.L.J. 153=6 I.C. 290.

2. *Nakhola v. Kokaya*, (1923) 69 I.C. 238.

3. *Phulchand v. Chandmal*, (1908) 30 All. 252.

4. See Transfer of Property Act (IV of 1882), S. 130.

5. *Ibid.* S. 3.

6. *Shib Lal v. Azmatulla*, (1896) 18 All. 265 F.B. See *Chauramoni v. Rajendra Kumar*, (1918) 42 I.C. 390.

7. *Aktar Beg v. Haqnawaz*, (1924) 78 I.C. 87.

chase of goods,¹ the right of a tenant to compensation in Malabar against the landlord,² the right of a usufructuary mortgagee to obtain possession,³ and the right of the vendor to receive the purchase money after he has completed the sale,⁴ are choses in action, transferable and attachable.

The transfer of the right to catch elephants entrapped in a pit on one's land, and to sue for the recovery of the elephants, if any, from any person in possession of them was held to be moveable property.⁵ So the transfer of ownership in immoveable property is not a transfer of an actionable claim though the owner is at that date out of possession.⁶ Likewise is a claim which has ripened into a decree not an actionable claim,⁷ and so is a right to recover the profits of a partnership.⁸

A right of action in respect of a tort or breach of contract resulting in injuries wholly to the person or feelings of a person is not assignable and as such not attachable;⁹ so are claims for damages for

1. *Nilahar v. Magniram*, (1875) B.P.J. 162; *Narsing Rao v. Magniram*, (1877) B.P.J. 226; *Rudra Parkash v. Krishna Mohun*, (1886) 14 Cal. 241; *Venkateswaran v. Raman*, (1916) 3 L.W. 435 = 33 I.C. 696; *The Official Assignee of Bombay v. Firm of Chandulal*, (1923) 76 I.C. 657.

2. *Vasudeva v. Damodaram*, (1899) 22 Mad. 86; *Achuta v. Kali*, (1884) 7 Mad. 545; *Anantha Bhatler v. Anantha Bhatler*, (1918) 36 M.L.J. 92 = 48 I.C. 705, (right to improvements of mulgeni tenant).

3. *Rani v. Ajudhia Prasad*, (1894) 16 All. 315 F.B.

4. See *Ahmed-Uddin v. Majlis Rai*, (1880) 3 All. 12.

5. *Ramakrishna v. Kukikal*, (1887) 11 Mad. 445.

6. *Modun Mohun v. Fatturunnissa*, (1886) 13 Cal. 297; *Mata Prasad v. Mt. Andan Kuar*, (1899) 3 O.C. 215.

7. *Afzal v. Ram Kumar*, (1885) 12 Cal. 610; *Dagadu v. Vanji*, (1899) 24 Bom. 502; *Gopal v. Joharimal*, (1891) 16 Bom. 522; *Delhi & London Bank v. Pertab*, (1906) 28 All. 771 F.B.; *Goyadin v. Syed*, (1907) 10 O.C. 136; *Harri Prasad v. Koda Marya*, (1917) 1 Pat. L.J. 427 = 37 I.C. 998.

8. *Srinath v. Kanhaiylal*, (1924) 75 I.C. 817.

9. *The Official Assignee of Bombay v. Firm of Chandulal*, (1923) 76 I.C. 657. (It will not pass to the official assignee in bankruptcy.)

assault or libel. Regarding the right to recover damages for fraud and wrongful attachment, Turner C. J. said " I do not hesitate to say that in my opinion, the right to complain of a fraud is not a marketable commodity and if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right the purchaser cannot call upon this court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savours of it too much for this court to give its aid to enforce the agreement."¹

Right of
personal
service.

Right of personal service is not attachable.² A priestly office with emoluments,³ a *jyotishi vritti* or a similar *vritti* or office,⁴ right of worship of a Hindu idol,⁵ and a right to the surplus profits of a Shebait⁶ cannot be sold in execution. Jatribalis of Gayawals are merely entries of names and addresses of pilgrims and represent the claim of the Gayawal for personal service and are not

1. *Pragilal v. Fateh Chand*, (1882) 5 All. 207.

2. C.P.C., S. 60 (1) (b).

3. *Mallika v. Ratanmani*, (1897) 1 C.W.N. 493; *Kuppa v. Dorasami*, (1882) 6 Mad. 76; *Narasimha v. Anantha*, (1881) 4 Mad. 29; *Jhummon v. Dinooath*, (1871) 16 W.R. 171; *Narayana v. Ranga*, (1891) 15 Mad. 183; *Paragi v. Gauri Shankar*, (1919) 9 C.L.J. 157=51 I.C. 86; *Durgaprasad v. Shambhu*, (1919) 41 All. 656 on appeal from (1918) 43 I.C. 650; *Balmukand v. Madan Chotia*, (1920) 1 Pat. L.T. 75=55 I.C. 175; *Neti Anjaneyulu v. Sri Venugopal Rice Mill*, (1922) 45 Mad. 620 (Swastivachanam service).

4. *Ganesh v. Shankar*, (1896) 10 Bom. 395; *Govind v. Ramakrishna*, (1897) 12 Bom. 366; *Rajaram v. Ganesh*, (1898) 23 Bom. 131 (a *vritti* can be sold in execution if expressly ordered in the decree) [dissenting from *Sadasio v. Jayantbai*, (1893) 8 Bom. 185].

5. *Dubomisser v. Srinibas*, (1870) 5 B.L.R. 617; *Kaleechurn v. Bungshee*, (1871) 15 W.R. 339.

6. *Juggernath v. Kishen Pershad*, (1867) 8 W.R. 226. See *Puncha Thakur v. Bindeshri*, (1916) 43 Cal. 28; also *Ashutosh v. Durgachurn*, (1909) 36 Cal. 504.

attachable, though such Jatribalis are sold at fancy prices and have a marketable value.¹

Personal contracts are not assignable and as such not attachable.² Where contracts involving personal obligation in the contractor are said not to be assignable, what is meant is, not that contracts involving obligations special and personal can be assigned in the full sense of shifting the burden of the obligation to a substituted contractor any more than where it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself whereas in the second he cannot. So when the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned and can be put in suit by the assignee in his own name after notice.³ But the assignment to a person of the right to recover damages for breach of a contract is invalid in as much as such an assignment amounts to merely a right to sue which it is the policy of the law to discourage.⁴ If in such a case however an assignment is made before the breach occurs, it would not be open to any objections, though the assignee may have expected the breach and recovery of no more than damages. The reason is that in the one case what is sold is the benefit of a contract, while in the other the property sold is a mere right to sue for its breach which the law condemns.

1. *Lachman Lal v. Baldeo Lal*, (1922) 3 Pat. L.T. 603=68 I.C. 944.

2. See *Karan Khan v. Dangushti*, (1919) 47 I.C. 902.

3. *Tolhurst v. Associated Portland Cement Manufacturers Ltd.*, (1902) 2 K.B. (660).

4. *Alen Mahomed v. S.C. Chunder*, (1909) 36 Cal. 345; *Gopala v. Ramasami*, (1910) 7 M.L.T. 220=6 I.C. 290.

Executory
contracts.

Executory contracts are not assignable to third parties and the latter cannot sue for the performance of these contracts, but if the contracts are not of such a personal character that their performance cannot be claimed except by the original parties themselves, the benefit of the contract will pass to the assignee and he can have the benefit, so far as they are consistent with the rules of procedure.¹

Where subsequent to the conveyance by three brothers of their lands to a person, the vendee agreed to reconvey the lands to him if within a specified time he without the help of the others and by his own earning paid the sale price, and the assignee of the right of that vendor under this agreement offered the price and sued for the reconveyance, it was said that the agreement created a contract personally with one of the vendors which was not assignable and the assignee was held to have acquired no right against the vendee.²

A contract by which a person bound himself to purchase goods of a specified quality from another, undertaking not to purchase them from any other merchant for a certain time, is a contract of a personal nature the benefit of which could not be claimed by the purchaser's assignee.³ If a painter, singer or sculptor is engaged to do a service, it is obvious that the obligation to do the service cannot be assigned. So is a lawyer incapable of assigning his benefit.⁴ Such too are contracts between master and servant or principal and agent.⁵

1. *Jiwan v. Haji Oosman*, (1903) 5 Bom. L.R. 373; *Venkatesvara v. Raman*, (1916) 3 L.W. 435=33 I.C. 696.

2. *Uthandi v. Ragavachari*, (1905) 29 Mad. 307; *Sital Pershad v. Luchmi Persad*, (1883) 10 I.A. 129; *Rama Kant v. Kali Jey*, (1911) 11 I.C. 124.

3. *Kemp v. Baerselman*, (1906) 1 K.B. 604.

4. *Birju v. Mahammad*, (1889) A. W.N.18.

5. *Farrow v. Wilson*, 4 C.P. 744.

Contracts based on personal considerations are therefore not assignable without the consent of the debtor or other party to contract,¹ and such consent would operate not as validation of an invalid business, but as a novation of the contract.

The rule in India as to the assignability of executory contracts for the purchase and sale of goods is that the benefit of such a contract can be assigned, understanding by benefit the beneficial interest under the contract and the right to enforce it, subject to two qualifications that the benefit is not coupled with any liability or obligation that the assignee is bound to discharge and the contract has not been induced by personal considerations or qualifications as regards the parties to it.²

Rights which the judgment-debtor has the option of enforcing or not, that is, which depend upon his personal volition, cannot be garnished. So is the right to manage a public choultry,³ or a right to residence.⁴ A judgment-debtor having a right to re-enter for condition broken,⁵ or to disaffirm a conveyance made by him while a minor is not seized of any present estate. Whether he will in future become seized of an estate is dependent on his volition; so is the right to recover usurious interest paid. These are personal pri-

Personal
rights.

1. *Namasivaya v. Kadir*, (1893) 17 Mad. 168.

2. *Jaffer v. Budge Budge Jute Mills Co.*, (1906) 33 Cal. 702; *Nathu v. Hansraj*, (1906) 9 Bom. L.R. 114; on appeal, 9 Bom. L.R. 838.

3. *Rama v. Shamrao*, (1904) 7 Bom. L.R. 135; *Alagappa v. Sivarama Sundara*, (1895) 19 Mad. 211.

4. *Nanak v. Kishen*, (1900) P.R. 8; *Salakshi v. Lakshmayee*, (1908) 31 Mad. 500.

5. See Transfer of Property Act (IV of 1882), S. 111. *Vaguran v. Rangayyanagar*, (1891) 15 Mad. 125.

vileges and cannot pass by a sale in execution. "The same principles lead to the denial of a right to garnish a stock-holder in a corporation who has not paid in full the amount subscribed by him to its corporate stock where his duty to complete such payment is by law dependent upon assessment or call therefor being made by the corporation. No cause of action exists against him in the absence of such call or assessment and garnishment is a proceeding that can neither compel the requisite action by the corporation or make its absence immaterial."¹

It is sometimes contended that where the minor had a right of action to avoid an alienation for three years after he became a major if he had been alive, the reversioner is entitled on his death to avail himself of such action and to prove those circumstances which would tend to show that the alienations would not have bound the minor. The right to affirm or disaffirm an alienation, made for instance by a natural guardian, can be exercised only at the discretion of the ward. Such a right is personal to him and cannot be called in law property that can devolve on his heir by right of succession and it cannot therefore be sold in execution of a decree against the heir.² In *Narayana Reddi v. Kamakshi Ammal*,³ the minor plaintiff sued for the recovery of the property alienated by the will of his father on the ground that the property belonged to the joint family and could not have been the subject of a testamentary disposition by his father and when the minor died pending the suit his reversioner was

1. Freeman on EXECUTIONS, I. 803, 890.

2. See *Muthukumara v. Anthony*, (1915) 38 Mad. 267 (277).

3. (1914) 27 M.L.J. 674=27 I.C. 396.

allowed to continue the suit. In that case if the fact that the property alienated was joint family property was true the will would be void, the donee under the will would acquire no title at all by the bequest and in spite of that will the title would continue in the minor. That is, the minor never became divested of the property legally and at his death the title was in him and could descend to his heir at law on his death. But if the minor had already become divested of the property by an alienation which was only voidable at his option, no title would remain in him at his death for succession or attachment to operate upon. Their Lordships clearly appreciated this distinction and would not approve of the argument that in the case before them the cause of action was in any way personal to the minor. They did not lay down, that in cases where the right of suit as here is personal to one and the chance of suit can only be at his discretion, such a right can pass from him to any other. If the minor lives on for 19 years and a creditor seeks to execute a decree obtained against him against the property alienated by his natural guardian during his minority, such property cannot be subject to seizure in execution.

It would seem that when once the personal volition finds expression and the person entitled to make the choice exercises his mind in favour of asserting his optional right, the position is different and the transferee of the property or the reversion in it to which the right appertains, will have the benefit, so that such property would be attachable in execution.¹

1. See *Vaguran v. Rangayyanagar*, (1891) 15 Mad. 125 ; *In re Davis & Co.*, 22 Q. B. D. 194.

Stipends and gratuities.

Stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf, and political pensions are exempt.¹

Political pension.

A pension is a periodical allowance or stipend granted, not in respect of any right or privilege, perquisite or office, but on account of past services or particular merits or as compensation for dethroned princes, their families and dependants.² A pension which the Government of India has given a guarantee that it will pay, by a treaty-obligation contracted with another foreign power is in the strict sense a "political pension." An allowance payable by the Government of India to the member of the family of the King of Oudh and his heirs in perpetuity under an arrangement of 1882 is a political pension.³ So are the allowances granted to the members of the Mysore Royal family,⁴ to the descendants of the Nawab of Carnatic⁵ and to the Candyen princes of Ceylon.⁶ A political pension is what is granted for reasons of State, so that a mere grant of land free of revenue or at a favourable rate as a reward for good service rendered to Government is not a pension, for 'pension,' implies the periodical payment of money under sec-

1. C. P. Code, S. 60 (1) (g).

2. *Amna Bibi v. Najmunnissa*, (1909) 31 All. 382; *Secretary of State v. Khemchand*, (1869) 4 Bom. 432; *Bansi Ram v. Narasingha*, (1914) 24 I.C. 805; *Sakina Bai v. Kaniz Fatima Begum*, (1915) 22 C.W.N. 577=47 I.C. 632 P.C.

3. *Bishambar v. Imdal Ali*, (1890) 18 Cal. 216 P.C.; *Jafar Mirza v. Bhagwan Das*, (1898) 1 O.C. 170.

4. *Mahomed v. Mahomed*, (1867) 7 W.R. 169.

5. *Mahomed v. Comandur*, (1862) 4 M.H.C. R. 277.

6. *Muthusami v. Prince Alagia*, (1903) 26 Mad. 423.

tion 8 of the Pensions Act.¹ A grant of land by Government for political considerations to a person as an absolute estate is not a political pension and the land so granted is not exempt from attachment in execution of a decree.²

A political pension is personal and excludes grants made for religious or charitable purposes.³ The provisions of the Pensions Act, 1871 are not therefore applicable to endowments like the Matam service inam, or Yammia allowance which is primarily a grant for the maintenance of a religious endowment although beneficial to the family who administer it.⁴

A political pension may take the form of Jagir, which is the part of land revenue⁵ construed *prima facie* to be an estate only for life, although it may be granted on such terms as to make it hereditary.⁶ A Jagir when in the nature of a political pension is exempt⁷ but not otherwise.⁸

The Pensions Act authorises the transfer of Pensions Act.

1. *Lachmi Narain v. Makund*, (1904) 26 All. 617 ; *Balwant v. Secretary of State*, (1905) 29 Bom. 480.

2. *Fatima Begam v. Sakina Bibi*, (1915) 36 All. 318 (Rights of the grantee and descendants should be determined by reference to the original sanad).

3. *Secretary of State v. Abdul Hukkin*, (1880) 2 Mad. 294 ; *Venkateswara v. Secretary of State*, (1908) 31 Mad. 12. See also *Subramanya v. Secretary of State*, (1887) 6 Mad. 361 ; *Bahauddin v. Moti*, (1878) P.R. 270. See contra *Vyankaji v. Sarja*, (1891) 16 Bom. 537 ; *Miya v. Sayad*, (1896) 22 Bom. 496.

4. *Kolandai v. Sankara*, (1881) 5 Mad. 302 ; *Attavulla v. Geuse*, (1888) 11 Mad. 283.

5. *Muhammad v. Lachminath*, (1906) P.R. 95.

6. *Gulabdas v. Collector of Surat*, (1878) 3 Bom. 186 P.C.

7. *Shankurdas v. Basant Singh*, (1890) P.R. 133 ; *Basant Singh v. Asa Ram*, (1893) P.R. 47 ; *Nawab Abdulla v. Kuddan Mal*, (1894) P.R. 4 ; *Bansi Ram v. Narasingha*, (1914) 24 I.C. 805.

8. See *Jowala Singh v. Dwarka Das*, (1901) P.R. 92.

pensions therein specified¹ and such pensions though political are transferable and as such attachable.² Where the decree sought to be attached was passed before the Pensions Act came into force, the application was held not barred for want of a certificate under S. 4 of that Act.³ When the assessment on an *Ubari* tenure was raised but the Government as a matter of grace assigned certain shares of the increment to certain persons, it was held that those shares were profits of property and not a pension.⁴

Gratuities allowed by Government as bonuses, whether they are allowed to pensioners or granted in consideration of past services are exempt.⁵ So will be a bonus granted in addition to pension.⁶ And likewise will be arrears of pension accrued due at a pensioner's death.⁷ A *Zora garas hak* is not a pension,⁸ nor are lands granted by the Government for services rendered but not revenue-free.⁹ So is an annual sum paid by the Government as compensation for loss caused to the grantee by the resumption of rent-free lands.¹⁰

Every grant made for past service is not a pen-

1. Act XXIII of 1871, S. 7.

2. *Sahibunnissa v. Hafiza*, (1887) 9 All. 213.

3. *Secretary of State v. Khemchand*, (1880) 4 Bom. 432.

4. *Balkrishna v. Govind Rao*, (1892) A.W.N. 161.

5. *Bawandas v. Banwaridas*, (1884) 6 All. 173.

6. See *Kkasim v. Carlier*, (1882) 5 Mad. 272 (It was attachable before 1st June 1882, as 'bonus' was not then a 'pension'); also *Subraya v. Velayuda*, (1906) 30 Mad. 153.

7. *Valla Thamburatti v. Amijani*, (1902) 26 Mad. 69.

8. *Dharzmdas v. Hofasji*, (1894) 19 Bom 250.

9. *Lachinarasu v. Makund*, (1904) 26 All. 617 ; *Balakrishna v. Govinda Rao*, (1892) A.W.N. 161 ; *Amnabibi v. Najmunnissa*, (1909) 31 All. 382.

10. *Jiban v. Sripaticharan*, (1904) 8 C.W.N. 665 ; *Subraya v. Velayuda*, (1906) 30 Mad. 153.

sion within the meaning of the Pensions Act.¹ The Act draws a distinction between pensions and grants of money and land revenue.

The privilege of exemption attaches only to pension as such. When therefore the amount of the pension due has been paid into a bank to the pensioner's account it may be attached, though a mere crediting of the pensioner's account with the amount by the bank is not sufficient.² Where the pension is commuted, the commutation money is apparently attachable.³

Private pensions, as distinguished from those granted by the Government, are either 'debts' or 'property belonging to the judgment-debtor' and can be attached as such, but not before they have become due and payable. Such are pensions granted by Railway Companies to their servants.⁴ A gratuity paid by a University for services rendered is not a pension granted by the Government and is not exempt. It constitutes a debt and can be attached even before it becomes due.⁵

Private pension.

Allowances (being less than salary) of any public officer or of any servant of a Railway Company or local authority while absent from duty are now wholly exempt.⁶ The Code of 1882 did not deal with these allowances, so that they were held

Allowances of officers.

1. *Jagirdar Ram Rao v. Kottippi Thimmareddi*, (1919) 11 L.W. 398 = 54 I.C. 33; *Subraya Mudali v. Velayudha Chetty*, (1906) 30 Mad. 153; *Secretary of State v. Khem Chand*, (1880) 4 Bom. 432; *Rama Iyer v. Secretary of State*, (1909) 20 M.L.J. 88 = 4 I.C. 105.

2. *Jones & Co. v. Coventry*, (1909) 2 K. B. 1029.

3. *Crowe v. Price*, (1889) 22 Q.B.D. 429 C.A.

4. *Bhojrab v. Mahub*, (1880) 6 C.L.R. 19; *Syed Tuffazal v. Raghunath*, (1871) 14 M.I.A. 40; *Harsankar v. Bajnath*, (1901) 23 All. 164.

5. *Mahomed Abdulla v. Jivan Mal*, (1921) 75 I.C. 945.

6. C.P.C., S. 60 (h).

to stand on the same footing as salary while on duty, as regards exemption from attachment.¹

The salary of a public officer or a servant of a railway company or local authority can be attached only *partially*, except where it does not exceed Rs. 40 a month, in which case the whole of it is exempt.² The limitation on attachment of salary and allowances thus enacted and the powers conferred on the Court by Order 21, rule 48 for realisation in instalments have reference only to the case of a public officer, or of a servant of a railway company or local authority. If therefore the judgment-debtor is not a public officer or such servant, for instance, where he is the servant of a private body, the attachment is unrestricted and the whole salary and allowances may be realised at once. An attachment of the unprivileged portion cannot be refused on the ground that the attachment, if allowed, would not leave enough for the officer to live on.³ •

Public officer.

“A public officer” means a person falling under any of the following descriptions, namely:—

- (a) every judge;
- (b) every member of the Indian Civil Service;
- (c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government;
- (d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or

1. *Beard v. Samuel*, (1883) 6 Mad. 179.

2. C.P.C., S. 60 (i). The Code of 1859 did not make such exemption: *Tejram v. Kusaji*, (1870) 7 B.H.C.A.C. 110.

3. *Devi Prasad v. Lewis*, (1918) 40 All. 213; *Ramchandra v. Shyamacharan*, (1913) 18 C.W.N. 1052--21 I.C. 950.

to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties ;

- (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;
- (f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;
- (g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government : and
- (h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty ;

A Kbot is not a public officer and the percentage on collections received by him is not salary and is wholly attachable.¹ The remuneration of a watandar can be attached, if in his own hands, but not while in the hands of the disbursing officer.² The salary of a private servant can be attached as a 'debt', when it has become due.³ An attachment upon the salary of a railway servant ceases to be operative after he has filed his petition in insolvency and should be withdrawn on notice of the making of the vesting order.⁴ Salary of a railway servant who resides within jurisdiction, while in the hands of a disbursing officer, who holds office beyond jurisdiction is not attachable.⁵ Moggu is an allowance received by a *wargdar* from *walawargdars* who hold lands within his *warg*, as remuneration for his collecting the revenue payable to the Government. The right to such allowance is saleable, but payment can be claimed only after the obligation to collect the revenue is fulfilled.⁶

Pay of Native
Army.

The pay and allowances of persons to whom the Indian Articles of War⁷ apply are exempt. The Indian Articles of War apply to soldiers and followers of the Native Army, so that their pay and allowances are exempt.

Under the Code of 1882, section 60, sub-section (2), it was provided that "nothing in this section shall be deemed to affect the provisions of the Army

1. *Rovi v. Sayajirao*, (1889) 13 W. R. 673.

2. *Ganpatlal v. Sampatram*, (1873) 10 B.H.C.R. 400.

3. *Ayyavayyar v. Virasami*, (1897) 31 Mad. 393 ; *Deviprasad v. Lewis*, (1909) 31 All. 304.

4. *In the matter of Donoghue*, (1894) 19 Bom. 232.

5. *Sayadkhan v. Davies*, (1903) 28 Bom. 198.

6. *Ganapathi v. Mani Anantha*, (1911) 2 M.W.N. 233=10 I.C 665.

7. See Act V of 1869 as amended by Act XII of 1894.

Act or of any similar law for the time being in force" and this provision was continued by the Code of 1908 in section 60, until repealed by Act X of 1914.

Under section 136 of the Army Act (44 and 45 Vic. c. 58), "the pay of an officer or soldier of His Majesty's Regular forces shall be paid without any deduction other than the deductions authorised by this or any other Act or by any Royal Warrant for the time being, or by any law passed by the Governor-General of India in Council. And under the proviso to section 144 of the same Act it was enacted: "Provided that any person having cause of action, or suit against a soldier of the regular forces may, notwithstanding anything in this section, after due notice in writing given to the soldier, or left it at his head-quarters, proceed in such action or suit to judgment and have execution other than against the person, pay, arms, ammunition, equipment, residential necessities or clothing of such soldier."

As the effect of the sub-section aforesaid, it was held that the pay of an officer or soldier of His Majesty's Regular Forces was not liable to attachment at all.¹ On the interpretation of the expression "His Majesty's Regular Forces" the Courts differed. While all the High Courts agreed that an officer of the British Army was an officer of His Majesty's Regular Forces and his salary was as such exempt, in regard to an officer in the Indian Army, the High Courts of Madras and Calcutta² held that he was not

1. *Lecky v. Bank of Upper India*, (1911) 33 All. 529; *Velchand v. Bouchier*, (1912) 37 Bom. 26; *Oakes & Co. v. Discarrie*, (1910) P.R. 10=5 I.C. 802.

2. *Watson v. Lloyd*, 1901) 25 Mad. 402; *Calcutta Trades Association v. Ryland*, (1886) 24 Cal. 102.

an officer of such Regular Force and the High Court of Bombay¹ held the contrary, so that according to the former view his salary could be attached under the C. P. Code and according to the latter view it could not be so attached.

The said sub-section (2) of section 60 was repealed by Act X of 1914. The result of this repeal has become the subject of much discussion.

*Prins v.
Murray &
Co.*

In *Prins v. Murray & Co.*,² the Judicial Commissioners of Oudh held that Honorary Commissioned Officers employed in the Subordinate Medical Department are 'public officers' as defined in the C.P. Code and also 'officers' as defined by section 190 of the Army Act, so they are not protected by section 144 of Army Act which exempts their pay from attachment and that their pay is attachable under the C.P. Code. The view of the law here taken was accepted by the Allahabad High Court in *Hay v. Ram Chander*.³ It was said that the effect of the repeal was to free the Court's power of attachment from the trammels of the Army Act and that the pay of the officer of the Indian Army while serving in this country is attachable in execution of a decree under the C.P. Code. A similar view was taken in Bombay in *Kering Rupchand & Co. v. Murray*.⁴ Marten J. reviewed the authorities and said "A British officer in the Indian Army is a Public officer within the meaning of section 2 (1) of the C.P. Code and that as such public officer he is liable to have half his pay or salary attached under section 60 (1) (i) of that

*Kering
Rupchand
& Co. v.
Murray.*

1. *King, King & Co. v. Davidson*, (1914) 38 Bom. 667.

2. (1914) 17 O. C. 99=23 I.C. 935 (where there is an elaborate discussion of the case-law.)

3. (1917) 39 All. 308.

4. (1918) 43 Bom. 716,

Code, inasmuch as that attachment is a deduction authorised by a law (viz., the Civil Procedure Code) passed by the Government of India in Council within the meaning of section 137 of the Army Act, 1881, as amended by section 4 of the Army (Annual) Act, 1895, and the proviso in section 60 (2) (b) of the Code having been repealed by Act X of 1914, must be regarded as unnecessary or dead law and that the decisions based on that proviso¹ must be regarded as obsolete."

In Upper Burma, the question arose in *Santa v. Battersby*,² whether the pay of a non-commissioned officer is exempt from attachment and it was answered that it was exempt. Rigg J. C. said "The question for decision resolves itself into one whether sub-clause 1, section 60, C P. Code, authorises the attachment of soldier's pay and if so how it is to be reconciled with section 144, Army Act. Clause 1 exempts to a certain extent the pay of public officers or servants referred to in clause (h) from attachment when they are on duty. 'Public officer' is defined in section 2 (17) C.P. Code, and includes commissioned or gazetted officers in the military forces of His Majesty and every officer in the service or pay of the Government. It is argued that non-commissioned officers fall within the latter description and that therefore their pay is subject to attachment to the extent allowed in section 60 (1), unless section 144, Army Act, is to override this section. The reply to the argument is that in section 136, Army Act, the term officer does not include a

*Santa v.
Battersby.*

1. *Colonel Lecky v. Bank of Upper India Ltd.*, (1911) 32 All. 529; *Velchand v. Bourghier*, (1912) 37 Bom. 26; *King, King & Co. v. Davidson*, (1914) 38 Bom. 667.

2. (1917) 11 Bur. L.T. 150=42 I.C. 90.

non-commissioned or warrant officer, who is merely a soldier within the meaning of that section and the provisions of section 144, Army Act, prevent the operation of section 60 (1), C. P. Code."¹

*Duckworth v.
Duckworth.*

In *Duckworth v. Duckworth*,² it was held that an Assistant Surgeon in the Indian Medical Service, though he is a Gazetted officer and therefore a public officer whose pay is liable for attachment under the C. P. Code, is also a First Class Warrant Officer and therefore a soldier as defined by section 90 of the Army Act and that, when the commander-in-chief ordered the deduction of a particular sum to answer a decree for maintenance against him, under section 145 of the Army Act, the procedure of section 145 prevailed over the procedure in section 60 of the C. P. Code and no attachment of pay is possible.

*Indian Staff
Corps.*

Formerly British Officers of the Indian troops constituted a body known as the Indian Staff Corps. In 1902, the use of the term 'Staff Corps' was abandoned and these officers are now said to belong to the Indian Army. These officers are employed not only in the Indian Army and in military appointments on the staff but also in a large number of civil posts subject to the direction of the Government.³

1. See also *Murray & Co. Ltd. v. Prins*, (1911) 14 O. C. 82 = 10 I. C. 719.

2. (1913) 43 Bom. 368.

3. Ilbert's GOVERNMENT OF INDIA, 3rd Edn., 157. *Kering Rupchand & Co. v. Murray*, (1918) 43 Bom. 716. As regards officers of the Indian Staff Corps, if they were public officers, there was a difference of opinion between the High Courts of Calcutta and Madras, the former saying that they were and the latter that they were not. See *Calcutta Trades Association v. Ryland*, (1896) 24 Cal. 103; *Watson v. Lloyd*, (1901) 25 Mad. 402.

Compulsory deposits under the Provident Funds Act, (IX of 1897)¹ are not attachable.²

Under section 4 of that Act,

(1) "Compulsory deposits in any Government or Railway Provident Fund shall not be liable to any attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or depositor in, any such Fund, and neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure³ shall be entitled to, or have any claim on any such compulsory deposit.

Provident Fund.

(2) Any sum standing to the credit of any subscriber to, or depositor in any such Fund at the time,

1. Under that Act section 2,

(1) "Provident Fund" means a fund in which the subscriptions or deposits of any class or classes of employees are received and held on their individual accounts, and includes any contributions, credited in respect of, and any interest accruing on, such subscriptions or deposits under the rules of the Fund :

(2) "Government Provident Fund" means a Provident Fund constituted by the authority of the Government for any class or classes of its employees :

(3) "Railway Provident Fund" means a Provident Fund constituted by the authority of the Government of India, or of any company which administers a railway or tramway in British India, either under a special Act of Parliament or under contract with the Secretary of State in Council or the Government of India, for any class or classes of the employees on, or in connection with such railway or tramway : and

(4) "Compulsory deposit" means a subscription or deposit which is not repayable on the demand, or at the option, of the subscriber or depositor, and includes any contribution which may have been credited in respect of, and any interest or increment which may have accrued on, such subscription or deposit under the rules of the Fund.

2. C.P.C., S. 60 (1) (k). When an attachment of the Provident Fund is not possible, a receiver too cannot be appointed. (See *Palikram v. Krishnan Nair*, (1916) 40 Mad. 302 and Chapter on *EQUITABLE EXECUTION* post.

3. This Chapter has been repealed and replaced by the Provincial Insolvency Act (V of 1920).

of his decease and payable under the rules of the Fund or under this Act, to the widow or the children, or partly to the widow and partly to the children, of the subscriber or depositor, or to such person as may be authorised by law to receive payment on her or their behalf, shall vest in the widow or the children, or partly in the widow and partly in the children as the case may be, free from any debt or other liability incurred by the deceased, or incurred by the widow or by the children, or by any one or more of them, before the death of such subscriber or depositor.

(3) Nothing in sub-section (2) shall apply in the case of any such subscriber or depositor as aforesaid dying before the thirteenth day of March 1903."

*Hindley v.
Joynarain.*

In *Hindley v. Joynarain*,¹ the judgment-debtor was dead and his deposit with the East India Railway was sought to be attached. Rankin J. said with reference to the Provident Fund Acts: "These Acts make provision in the interests of certain large classes of employees for a scheme of compulsory and to a limited extent voluntary thrift. Part of the employee's wages is impounded whether he likes it or not; within narrow limits he has an option to contribute more; the employer has on his side to add a contribution; and these sums together with interest, profits or other increments make a total fund of which a defined proportion is held on the individual account of each employee. The Legislature is dealing with people who are poor, with people who are being compelled, and with such people in very large numbers. Its intention is that such people shall in case of necessity be able to afford a passage home to Europe, in case of retirement

1. (1919) 46 Cal. 962.

have something to live on, in case of death have something to leave. It is not ignorant that if a railway has a hundred thousand employees, the temptation to run into debt or to charge or anticipate his share will occur at some moment of his lifetime to ninety thousand of them at least. Neither the Railway Company nor the Institution is to have its money wasted in large quantities upon the management expenses. There is to be no standing army of attorneys' clerks attending to notices and orders from all the Courts in India, settling priorities among competing claims, paying the money into Court as soon as it comes in and acting towards creditors and mortgagees as a providence with costs out of the fund. By rules made for this Institution under the Act, when an employee dies his share if small is to be summarily and directly distributed according to special rules which brush aside the ordinary law as to wills or intestate succession. If his share is larger it is payable to his executor or administrator and to him only on production of his grant: the burden of a due administration is thus put upon the proper shoulders. Whether the employee is in the service or out of the service, whether he be alive or dead, his share is unattachable in the hands of the Institution. This is the very basis of the scheme. Section 4 (1) of the Amended Act has been judicially construed in *Veerchand v. B. B. & C. I. Ry. Co.*¹ and *Seth Mannalal v. Gainsford*.² It means what it says and is no hardship upon anybody. The plaintiffs' point ever since their action was started before the Munsif, at the trial, on appeal before the District Judge, before me and most probably in

1. (1904) 29 Bom. 259,

2. (1908) 35 Cal. 641.

the Small Cause Court, rests upon sub-section (2) of section 4. That has got nothing to do with this case and in no way cuts down sub-section (1). It is a further provision directed to a wholly different matter. It ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased's estate. Nay more; the Legislature knowing that this might be rendered ineffective by getting the widow or child to incur or to join in incurring the debt, provides (for the more complete discouragement of creditors) that such money, although in the hands of the widow or the child, shall not be made to answer for their own debts if incurred in the lifetime of the deceased. The only light thrown by the second sub-section upon the first is that the first did not go far enough."

The same rule will apply to deposits when they become due on the judgment-debtor's death or termination of service with the deposittee, as also to subsequent accretions, such as contributions, interests, or increment on original deposits.¹ Therefore neither the receiver in insolvency nor the creditors of the insolvent have any right to money drawn by the insolvent from such compulsory deposits.²

A Bill has been recently introduced in the Legislative Assembly to amend and consolidate the law relating to Government and other provident

1. *Veerchand v. B. B. & C. I. Ry. Co.*, (1904) 29 Bom. 259; *Devi Prasad v. Secretary of State*, (1923) 45 All. 554; *Jagannath v. Taraprasanna Ganguli*, (1924) 3 Pat. 74; *Seth Manna Lal v. Gainsford*, (1908) 35 Cal. 641 (Municipal Provident Fund); *Secretary of State v. Raj Kumar Mukherjee*, (1912) 50 Cal. 347 (State Ry. Provident Fund).

2. *Nagindas v. Ghelabhai*, (1920) 56 I.C. 452; *Official Assignee of Madras v. Mary Dalgairns*, (1902) 26 Mad. 440. See *H. W. Parmer v. Cowasjee*, (1916) 14 A.L.J. 236=33 I.C. 723.

Funds. The objects of this bill are several. At present the Provident Funds Act provides that sums standing to the credit of depositors are payable to the widow or children at the decease of the depositor and such sums do not form part of the estate of the deceased and interests of the widow and children are protected. It is considered that the same degree of protection should be accorded to other dependents of the deceased besides the widow and children, as otherwise accumulations of the depositor, who dies before such accumulations are disbursed to him, may be held liable to meet the debts. It is also provided in the bill that with certain exceptions in spite of debts, liabilities, assignments or any form of encumbrance, the depositor on retirement or his dependants or nominees if he dies before retirement or after retirement but before actual disbursement should receive in tact the accumulations at his credit in the fund.

Wages of labourers and domestic servants, whether payable in money or in kind are exempt.¹ Wages of labourers etc.

The term 'labourer' carries with it the idea of actual physical and manual exertion or toil and is used to denote that class of persons who literally earn their bread by the sweat of their brows and who perform with their own hands at the cost of considerable physical labour the contracts made with their employers, that is, who earn their daily bread by personal manual labour and in an occupation which requires little or no art, skill or previous education. The term 'wages' means the compensation paid to a hired person for his service which may be a specified sum for a given time of service or a fixed sum for a specified piece of work,

1. C.P.C., S. 60 (1) (1).

that is, payment may be by the job. The term does not imply that the compensation is to be determined solely upon the basis of time spent in the service, but it may also be determined by the work done.¹ It also includes the idea not merely of one person working for another but also that he shall work under the directions of the latter and not as an independent contractor.² The expression 'domestic servant' is not confined to the servants who actually work in the house, but includes other persons who ordinarily form part of an Indian establishment, such as coachmen, syces, malis, palki-bearers and gardeners.³ In some cases, it may be a question of fact whether a particular person is a domestic servant or not.⁴ The voluntary payment by the employer, when garnished, of wages due into Court or to the sheriff cannot dissolve the exemption either in that or in any other action. Wages directed to be collected by another will be exempt in the latter's hands and a judgment for wages will likewise be free.⁵ The wages of coolies in the hands of a sirdar are not liable to be attached in execution of a decree against him.⁶

Under the Indian Merchant Shipping Act,⁷ "no wages due or accruing to any seaman or apprentice shall be subject to attachment from any

1. Freeman on EXECUTIONS, II, 1249-53; *Jechand v. Aba*, (1880) 5 Bom. 132.

2. For the distinction between servant and independent contractor, see Underhill's LAW OF TORTS (2nd Ind. Edn.) page 76.

3. *Dhanno v. Upendramohan*, (1872) 8 B.L.R. 244.

4. *Bhimdas v. Upendramohan*, (1872) 3 B.L.R. Ap. 1. See *In re Landson*, (1914) 1 Ch. 682 (domestic means household).

5. Freeman on EXECUTIONS, II, 1257.

6. *Sujjervan v. Gopaul*, (1868) 10 W.R. 149.

7. Act 1 of 1859, S. 73; Cf. 17 & 18 Vic. c. 101, Ss. 233-238 and 57 & 58 Vic. c. 60, S. 163.

Court; and every payment of wages to a seaman shall be valid in law, notwithstanding any previous sale or usufruct of such wages or of any incumbrance thereon; or no assignment or sale of such wages or of salvages made prior to the accruing thereof shall bind the party making the same; or no power of attorney or authority for the receipt of any such wages or salvages shall be irrevocable."

Under the Workmen's Compensation Act, save as otherwise provided by that Act, "no lump sum or half-monthly payment payable under this Act shall in any way be capable of being assigned or charged or be liable to attachment or pass to any person other than the workman by operation of law, nor shall any claim be set off against the same."¹

Books of account cannot be seized,² but the Court may direct their production in Court to prevent the judgment-debtor making away with them.³ A seizure of account books and trial balances is not equivalent to seizure of the demands and such demands must be transferred only by garnishment or other proceedings in aid of execution.⁴

Books of
account.

An attachment must operate at the time of the attachment upon some existing debt and it must not be of an anticipating character, so as to fasten upon some future state of the property.⁵

Expectancies.

An expectancy of succession by survivorship or other merely contingent or possible right or interest cannot be attached in execution. To the same

1. Act VIII of 1923, S. 9. Under S. 20 (ii) any reference to workman shall, when he is dead, include a reference to his dependants.

2. See *In re Pestonji*, (1866) 3 B.H.C.R. 42.

3. *Adjoodhya v. Middleton*, (1871) 3 N.W.P. 334.

4. Freeman on EXECUTIONS, I. 432.

5. *Haridas v. Baroda Kishore*, (1899) 27 Cal. 38.

effect is the rule that the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.¹ A contingent interest is contingent upon the happening of a contingency which may or may not come off, but a vested interest is unconditional, though the enjoyment only is postponed. The former is a mere possibility liable to be defeated or destroyed any moment and which therefore has neither the stability of existence nor any ascertainable value, which are the attributes of property.² The heir-apparent's chance of succession is a hope of succession (*spes successionis*) and is a mere contingency and not property capable of transfer or of attachment and sale in execution.³ Therefore the interest of a Hindu reversioner expectant on the death of a Hindu woman⁴ or the interest of a Mohomedan heir contingent on the death of a living owner⁵ cannot be followed in execution.

1. Transfer of Property Act (IV of 1882), S. 6 (a); *Annada Mohan v. Gour Mohan*, (1923) 50 Cal. 929 P.C.

2. *Beebe Tokai v. Davod*, (1865) 6 M.I.A. 510.

3. *Amrit Narayan v. Gaya Singh*, (1918) 45 Cal. 590 P.C.; *Ram Chandra v. Dharmo Narayan*, (1871) 7 B.L.R. 341 F.B.; *W. Dhar v. Htoon May*, (1921) 12 Bur. L.T. 106=62 I.C. 927; *Nizamuddin v. Mt. Jannat*, (1894) P.R. 58.

4. *Sham Sundar v. Achan Kunwar*, (1898) 21 All. 715 C.; *Babu v. Ramoji*, (1896) 21 Bom. 319; *Anandi Bai v. Rajaram*, (1897) 22 Bom. 954 (survivorship); *Nundkishore v. Raneeram*, (1902) 29 Cal. 355; *Achhan v. Thakur Das*, (1895) 17 All. (125); *Harnath v. Indar Bahadur*, (1923) 45 All. 179 P. C.; *Shashi Bhushan v. Hari Narain*, (1922) 48 Cal. 1059; *Ananda Mohan v. Gour Mohan*, (1923) 50 Cal. 929 P.C. on appeal from (1921) 48 Cal. 536; *Narasimham v. Madavarayulu*, (1903) 13 M.L.J. 323; *Manicram v. Ramalinga*, (1905) 29 Mad. 120; *Ghulam Muhammad v. Teck Chand*, (1921) 2 Lah. 198; *Dwarka Prasad v. Nasir Ahmad*, (1924) 78 I.C. 850.

5. *Shamsuddin v. Abdul*, (1907) 31 Bom. 165; *Rebatimohan v. Ahmed*, (1909) 1 I.C. 590; *Munshi v. Muhammad*, (1909) 2 I.C.

Where a pre-emptor has paid the price into Court the money ceases to be his property and cannot be attached in execution of a decree against him.¹ The interest of a successful pre-emptor in the pre-empted property, before the price fixed by the decree has been paid, is only a contingent interest and is unattachable.² Similarly, where it is agreed that the purchase-money on a sale of immoveable property shall be payable after the execution of the conveyance, so long as the conveyance remains unexecuted, the vendor's right to the purchase-money is a contingent interest and is unattachable.³ The bequest of a legacy is a mere possibility, for it may be defeated by the testator at his capricious will or may lapse by the testator surviving the legatee.⁴ So is a claim under a future award of arbitration.⁵ But a resulting trust is not a mere expectancy and is therefore attachable.⁶

In England possibilities and expectancies are assignable in equity for value,⁷ but the Indian law, in the territories to which the Transfer of Property Act, 1882 applies,⁸ recognises no distinction between law and equity and the transfer once prohibited cannot be legalised by any equitable consideration.⁹

865; *Abdul v. Goolam*, (1905) 7 Bom. L.R. 742; *Marangami v. Karupti*, (1913) 24 M.L.J. 258=18 I.C. 185; *Asa Beevi v. Karuppan Chetty*, (1917) 41 Mad. 365.

1. *Abdul Salam v. Wilayat*, (1897) 19 All. 256.

2. *Gorakh v. Sidh Gopal*, (1906) 28 All. 383.

3. *Ahmad-ud-din v. Malji Rai*, (1880) 3 All. 12.

4. See Indian Succession Act (X of 1865), S. 92.

5. *Tuffoozzool v. Raghoonath*, (1871) 14 M.I.A. 40.

6. *Antoo v. Ardeshir*, (1899) 1 Bom L.R. 303.

7. *Tailby v. Official Receiver*, 13 A.C. 523; *In re Ellenborough*, (1903) 1 Ch. 697.

8. This is not applicable to the Punjab; *Kabul Singh v. Mahamed Baga*, (1923) 73 I.C. 120.

9. *Shamsuddin v. Abdul Hosein*, (1907) 31 Bom. 165.

The offerings which may in future be made to an idol cannot be attached¹ nor can the earnings of a Gyawal from offerings made by pilgrims² nor can an expectant claim under an inchoate Award.³

Future
maintenance.

Right to future maintenance is not attachable.⁴ So is a decree for maintenance.⁵ Therefore a receiver cannot be appointed in execution of a decree to collect future maintenance due to the judgment-debtor and apply it in satisfaction of the decree. Whatever be the law in England, Courts in India are bound by the Transfer of Property Act, the clear implication of section 6(d) and (h) of that Act being that a right to receive future maintenance cannot be validly alienated and a transfer not recognised by the Transfer of Property Act as legally effective cannot create any right in the transferee.⁶

When the question arises whether a right to maintenance is assignable or not, the true test to be applied is, whether the intention of the grantor was to create a purely personal right to receive a certain sum of money in the grantee and consequently inalienable or whether his intention was to create an interest in property, either a fund or an estate, which should be treated as alienable property. Where a widow who had succeeded as heir to

1. *Shoilaga Nand v. Peary Churn*, (1902) 29 Cal 470.

2. *Poona Lall v. Kanhayalal*, (1890) 19 Cal. 730.

3. *Tuffuzool Hussein v. Raghoonath*, (1871) 14 M.I.A. 40.

4. C.P. Code, S. 60 (1) (n); *Daloon v. Sungun*, (1867) 7 W.R. 311; *Monesur v. Kishen*, (1875) 23 W. R. 427; *Re Robinson*, (1884) 27 Ch. D. 160 C. A.; *Watkins v. Watkins*, (1896) P. 227 C. A.; *Paquine v. Snary*, (1909) 1 K. B. 688 C. A. (maintenance due to a divorced wife).

5. *Nanammal v. Collector of Trichinopoly*, (1910) 20 M.L.J. 97=5 I.C. 879.

6. *Palikandy v. Krishnan*, (1917) 40 Mad. 302; *Holmes v. Millage*, (1893) 1 Q.B. 551.

her husband's properties surrendered her life-interest therein to the nearest reversioner who in return agreed to her residing in the family house and sharing in the meals of the family or to her receiving a certain amount of paddy annually if she chose to live away from the family house, the option being exercisable by her at her will and without her being subject to any liability to elect once and for all, it was held that the right to maintenance conferred on the widow was purely personal to her and was not transferable.¹ When a Hindu Brahmin father, while giving his daughter to a poor Kulin brahmin gave her by a deed of gift Rs. 6000 in a lump to be paid out of his estate for the construction of a house and an annual sum of Rs. 600 also payable out of his estate for the maintenance of the daughter with her children, it was held that the daughter had not merely a right of residence in the house and her interest in it was attachable, but her right to receive the monthly allowance was not so attachable, being only a right to future maintenance.²

The right and interest, such as in certain villages, made over to a Hindu widow by the family to which she belongs, in lieu of maintenance, cannot be attached and sold in execution of a decree against her,³ for such property when assigned for maintenance with a provision forbidding alienation is one over which the grantee has no power of disposal and as such exempt from attachment under this

1. *Subbayya v. Krishna*, (1923) 46 Mad. 659 F.B. (where all the authorities are referred to.)

2. *Tara Sundara v. Sordda Charan*, (1910) 12 C.L.J. 147.

3. *Gulab v. Bansidar*, (1893) 15 All. 371; on appeal (1891) 16 All. 143.

clause.¹ A contrary view was however taken, not perhaps rightly, in the Central Provinces, where notwithstanding prohibition against alienation, immovable property assigned as a maintenance grant was liable to be sold in execution of a money-decree against the grantee.²

Where a village has been transferred to a widow by her husband for her life-time with every right therein except the power of alienation, it was held that the right to receive the rents and profits of the village was not a right to future maintenance in as much as the rents were not specifically assigned as maintenance nor was it an attachment of any possible or contingent interest prohibited from attachment.³ So when properties were given to a member of Malabar Tarward in lieu of maintenance with a prohibition against alienation, except by lease, his interest was held attachable.⁴

A heritable right to receive a monthly allowance derived from a person's deceased wife, to whom it was assigned in lieu of her sale of landed property is not a mere right to maintenance and is saleable in execution.⁵ A maintenance charged by deed on the grantor's property and recoverable by suit on non-payment is attachable⁶ and so is a

1. *Diwali v. Apaji*, (1886) 10 Bom. 342; *Munasami v. Ammani*, (1904) 15 M.L.J. 7; *Nanak Chand v. Kishen Chand*, (1900) P.L.R. 209; *Basangowda v. Irgawdati*, (1923) 47 Bom. 597.

2. *Singai Parmanandsao v. Baji Rao*, (1901) 14 C.P.L.R. 114.

3. *Jairaj v. Debi*, (1883) A.W.N. 9; *Govinda v. Meenatchi*, (1911) 22 M.L.J. 204=13 I.C. 152; *Padmanund v. Ram Proshad*, (1921) 16 C.L.J. 354=17 I.C. 284.

4. *Kothal Mammad v. Pydal Nair*, (1915) 29 I.C. 578; see *Sundar Bibi v. Rajinder Narain*, (1921) 19 A. L. J. 648=63 I. C. 181.

5. *Salamat v. Lukhi Ram*, (1884) 10 Cal. 521; *Nilkunto v. Hurro Soondurce*, (1878) 3 Cal. 414 (malikana rights).

6. *Enael v. Nujeeboonessa*, (1869) 11 W.R. 138.

hereditary grant of an allowance of paddy out of the melvaram of certain land.¹

The prohibition of attachment extends only to a mere right to future maintenance and not to a debtor's property or any interest in it, though such property or interest might have been granted to him as for maintenance, and the crops standing on land attached for maintenance do not fall within the interdiction.²

Arrears of maintenance are attachable.³ An annuity given by will, not by right of maintenance, but out of the testator's bounty, is attachable.⁴ So was an annuity charged on an estate attachable in payment of debts due to the person who has inherited the estate from the grantor and by whom such annuity is now payable.⁵ When a person sells property partly for cash and partly for an annuity payable to the vendor the annuity is property capable of being attached in execution of a decree against him.⁶

The attachment of future rents and profits due to a Ghatwal as such by a prohibitory order is invalid.⁷ The income of a fund in the hands of

1. *Vaidyanatha v. Eggia*, (1907) 30 Mad. 279.

2. *Govinda Pillai v. Meenatchi Achi*, (1911) 22 M.L.J. 201 = 13 I.C. 152.

3. *Kasheshuree v. Greesh Chunder*, (1866) 6 W.R. 64; *Hoymobutty v. Koroonna*, (1867) 8 W.R. 41; *Hood Barrs v. Heriot*, (1896) A.C. 174; *Murlidhar v. Mulchand*, (1919) 52 I.C. 953.

4. *Gopal v. Marsden*, (1906) 10 C.W.N. 1102; *Maharani Dambar v. Rai Sham*, (1905) 9 C.W.N. 703; *Chote Narain v. Rameswar*, (1902) 6 C. W. N. 796 (*Babuana allowance*); *Jwala Prasad v. Sukhdei*, (1920) 57 I.C. 59; *Madan Lal v. Lal Ambika Baksh*, (1921) 24 O.C. 250 = 63 I.C. 851.

5. *Dherai v. Dhun Coomaree*, (1871) 17 W.R. 138.

6. *Har Shankar v. Baijnath*, (1901) 23 All. 164; *Padmanund v. Ramaprosad*, (1913) 17 C.W.N. 662 = 17 I.C. 284.

7. *Udoy Kumari v. Hari Ram*, (1901) 28 Cal. 483; *Sher Singh v. Sri Ram*, (1908) 30 All. 246; *Keshobati v. Mohan Chandra*, (1912) 39 Cal. 1010

trustees payable half-yearly to the judgment-debtor cannot be attached after the last payment had been made and before the next is payable, there being no debt owing or accruing.¹ A Shikmi Ghatwali tenure held under a superior ghatwal is exempt.² But the interest in a Ghatwali tenure in Bhagalpore is attachable if assented to by Zamindar.³ Arrears of *Wasika* allowance which accrued due in the life time of the wasikadar and were after his death paid to the heirs are not liable for the debts of the deceased in the hands of the heirs.⁴

The income of property belonging to a married woman, subject to a restraint on anticipation accruing due after the date of a decree against such married woman's separate property under section 8 of the Married Women's Property Act (III of 1874) is not liable to attachment in execution of such decree.⁵ Where a decree-holder sought to attach the life-interest of his judgment-debtor in certain funds which were with the Official Trustee, such interest was not validly attached, since an attachment under the Code could be valid only so far as it related to any specific amount, which might be set forth in the prayer for attachment, as being then payable or likely to become payable to the defendant.⁶

Property in
custody of the
law.

Property in custody of the law is not subject to execution. A receiver is an officer or represent-

1. *Webb v. Stenton*, (1883) 11 Q.B.D. 518.

2. *Bally v. Ganei*, (1882) 9 Cal. 388.

3. *Kali Prasad v. Anand Roy*, (1887) 15 Cal. 471 P. C., on appeal from (1884) 10 Cal. 677.

4. *Mahomed v. Sakina Begum*, (1918) 21 O. C. 329=49 I. C. 511.

5. *Mrs. Goudoin v. Venkatesa*, (1907) 30 Mad. 378. See Transfer of Property Act (IV of 1882), S. 10; *Boltho & Co., Ltd., v. Gidley*, (1905) A.C. 98; *Whiteley v. Edwards*, (1896) 2 Q.B. 48 C.A.

6. *Abdul Lateef v. Doutre*, (1887) 12 Mad. 250.

ative of the Court and his possession is the possession of the Court and the tenants in possession from whom he is appointed to receive rents and profits of immovable property become virtually tenants *pro hac vice* of the Court, their land-lord. The moneys in his hands are in *custodia legis* for the person who can make a title to them.¹ The same applies to money in the hand of any officer of the Court, such as Official Receiver, Registrar or Official Liquidator.² An attachment of property in the hands of a receiver is an interference with the Court's possession and cannot be made without the leave of the Court.³ When a receiver is appointed to take charge of an estate in dispute between A and B, a creditor of either A or B cannot without leave proceed against the estate.⁴

Property seized by a police officer from the person of a suspect or an accused must be, as a matter of public policy, safe from seizure for the time under civil process. It would be dangerous temptation to eager and sometimes unscrupulous creditors to resort to the machinery of criminal courts against their reluctant debtors. So it was said in America "if it were once understood that whatever of value was taken from the person of the

1. See *Vaguran v. Rangayyengar*, (1891) 15 Mad. 125; *In re Davis & Co.*, 22 Q. B. D. 194.

2. *Orr v. Muthia*, (1894) 17 Mad. 501; affirmed (1897) 20 Mad. 224; *Administrator-General v. Prem Lall*, (1895) 22 Cal. 1011 P.C.; *Sarala Sundari v. Sarada Prasad*, (1904) 2 C.L.J. 602; *Re Cowan's Estate*, (1880) 14 Ch. D. 638; *De Winton v. Brecon Corporation*, (1860) 28 Beav. 200. See C.P.C., O. 21, rule 52.

3. *Llewellyn v. Roland*, (1907) 97 L.T. 423; *Re Grcensill*, (1872) 8 C.P. 24; *Re Jarvis*, (1885) 1 T.L.R. 306.

4. *Khan v. Ali Mahomed*, (1892) 16 Bom. 577; *Mahomed v. Mahomed*, (1893) 21 Cal. 85. See also *Sidlingappa v. Shankarappa*, (1903) 27 Bom. 556. For the case of a mortgage before appointment of a receiver, see *Jogendra v. Debendra*, (1899) 26 Cal. 127.

party arrested by the officer having him in his charge could be at once impounded by the levy of an execution or attachment such a course would likely be productive of results oppressive to the individual and shocking to the moral sense of the community." But the decisions in America do not follow a uniform rule and often make a distinction between the good faith or bad faith of the arrest, preceding the removal of the property from the person of the prisoner.¹

Property in the custody of the law remains so, so long as it is held by an officer or person obliged to deliver it in obedience to or satisfaction of a judgment existing or contemplated in an action or proceeding in which it has been placed in legal custody. If goods are attached and placed in the possession of the defendant or a third person on a bond taken for production when called upon, they are in the custody of the law and the protection of the defendant, if he happens to be himself the obligee under such a bond, runs until the duty to keep them as stipulated in the bond has ended.²

Property or money cannot be placed in the custody of law by the voluntary act of a party, without an order of Court or without an action against him.³ A deposit of a sum of money in Court in answer to a suit for the same is good, and such a deposit can be followed in execution only in the manner provided by law. But when a person interpleads creditors and pays money into Court, without being required by the Court to do so, acts

1. Freeman on EXECUTIONS, I. 580-2.

2. Freeman on EXECUTIONS, I. 607-9. C.P.C., O. 21 r. 52; See *Rama Aiyar v. Gopala Aiyar*, (1918) 41 Mad. 1053.

3. Freeman on EXECUTIONS, I. 580.

only voluntarily and that money is attachable as his own under a judgment against him.¹

Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the state or effects of the Company after the commencement of the winding up shall be void.²

Leave is required before seizing goods in the hands of a receiver;³ but no leave is necessary, before the appointment is perfected though already made.⁴ The application must be made in the proceeding in which receiver is appointed and is known as an application *pro interesse suo*.⁵ The grant of leave is discretionary⁶ and the Court may refuse leave or postpone it or impose terms.⁷ But the discretion must be exercised judicially.⁸

Under the Registration of Societies Act, 1860, Property of societies.
 “if a judgment shall be recovered against the person or officer named on behalf of the society, such judgment shall not be put in force against the property moveable or immoveable or against the body of such person or officer, but against the property of the society.”⁹

1. C.P.C., S. 88, O. 35 r. 2.

2. Indian Companies Act (VII of 1913), S. 234.

3. *Kewney v. Attrill*, (1886) 34 Ch. D. 345; *Bowen v. Brecon Railway Co.*, (1867) L.R. 3 Eq. 541.

4. *Edwards v. Edwards*, (1876) 2 Ch. D. 291 C.A.

5. *Russell v. East Anglian Ry. Co.*, (1850) 3 Mac. & G. 104.

6. *Jones v. Jagyar*, (1886) 54 L.T. 731; *Bryant v. Torkington*, (1897) 13 T.L.R. 315 C.A.; *Re Clements*, (1901) 1 K.B. 260; *Hulbert v. Cathcart*, (1896) A.C. 470.

7. *Bell v. Denver*, (1886) 54 L.T. 729.

8. *Lee v. Bude & T.J. Ry. Co.*, (1871) L.R. 6 C.P. 577.

9. Act XXI of 1860, S. 5.

CHAPTER XVII

Attachment (*contd.*)

Foundation of attachment—Modes of attachment—Attachment in a decree for rent or profits—Agricultural produce—Debts, shares etc.—Joint interest in moveables—Salary of public officer—Property in custody of court or public officer—Decree—Debt—Decrees for money—Immoveable property—Negotiable instrument—Coin and Currency Notes—Cessation of attachment on satisfaction of decree—Cessation of attachment on insolvency—Cessation of attachment on judicial sale—Cessation of attachment on decree-holder's default—What is default—Effect of 'striking off' application—What is not a cessation of attachment—What is a cessation of attachment—Rule under the C. P. Code of 1908—Revival of attachments—Rights of attaching creditor—Effect of seizure—Effect of garnishment—Effect of attachment generally—Avoidance of alienation after attachment—Alienation must be private—Alienation must be contrary to attachment—Attachment must be subsisting—Attachment may be dormant—Attachment must have been effected—Attachment must have been effective—Attachment must not be *ultra vires*—Claims enforceable under the attachment—*Annamalai Chettiya v. Palamalai Chettiya*—Permission for private alienation—Attachment before judgment—Injunction.

Foundation
of attach-
ment.

Attachment is the process by which the Court reduces the property of the judgment-debtor to its own possession by laying its hands on it. The authority to interfere with the possession of the judgment-debtor is conferred on the Court and its officers by statute and to constitute such interference lawful, the forms prescribed by the statute must be strictly observed. An omission or deviation in the observance of the forms may render the attachment void and ineffective and may make the act a trespass.

Modes of
attachment.

Under the Code of Civil Procedure attachment is of four forms, seizure, charging order, proclamation and garnishment. These forms relate to and are

suited to different kinds of property and the mode prescribed for attachment is the only mode in which the particular property can be validly attached. If for instance a promissory note, which under the Code must be attached by seizure, is attached by a prohibitory order, the attachment is invalid.¹ Similarly the process of attachment must be followed as laid down by the Code and if, for instance, when a copy of the notice, which is directed to be sent to the Collector, is not so sent² or the copy of the proclamation was not properly affixed,³ the attachment is of no avail. It is therefore necessary for the decree-holder to be circumspect in choosing the mode of attachment and in adhering to the forms of the process.⁴

“Where a decree directs an enquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.”⁵ When therefore after the preliminary decree is passed in a suit for possession and profits⁶ the profits are being ascertained, pending such inquiry, an attachment can be ordered.⁷ An inquiry into mesne profits and a final decree following the inquiry, after the death of the judgment-debtor and without a

Attachment
in a decree
for rent or
profits.

1. *Subramania v. Chokkalinga*, (1923) 46 Mad. 415.

2. *Arunachellam Chetty v. Somasundaran Chetty*, (1911) 4 Bur. L.T. 148=12 I.C. 869; *Attar Singh v. Ghulam Muhammad*, (1921) 60 I.C. 527; *Jodhan v. Kapilnath*, (1923) 69 I.C. 563.

3. *Ibid.* *Wishnath v. Rahmatullah*, (1923) Lah. 671.

4. *Ibid.* *Wishnath v. Rahmatullah*, (1923) Lah. 671; *Mula Ram v. Jiwinda Ram*, (1923) 4 Lah. 211.

5. C.P.C. O. 21 r. 42 (=Old Code, S. 255)

6. *Ibid.* O. 20 r. 12.

7. See *Sharoda v. Wooma*, (1867) 8. W. R. 9; *Munshi Kali Sankar v. Maharajah Prabodanath*, (1912) 16 I.C. 708.

Moveable
property.

legal representative brought on record in his stead are without jurisdiction and the final decree is void.¹

“Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof. Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.”²

1. *Radha Prasad v. Lall Sahab*, (1891) 13 All. 53 P. C.; *Khiraïmal v. Daim*, (1905) 32 Cal. 296 P.C.

2. C.P.C., O. 21 r. 43 (= Old Code, S. 269).

For this rule the following rules are substituted in MADRAS:—

43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof. Provided that, when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot be conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this schedule with one or more sufficient sureties for its production when called for or (b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever any attachment made under the provisions of this rule ceases for any of the reasons specified in rule 53 or rule 57 or rule 60 of this order, the Court may order the restitution of the

Under the C.P. Code, moveable property in the possession of the judgment-debtor must be attached

Attachment of property on judgment debtor's person.

attached property to the person in whose possession it was before attachment.

43-A. (1) Whenever attached property is kept in the village or place where it was attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

The following rules have been added to Order 21 in Allahabad.

115. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

116. Where an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sums as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

by seizure and seizure only. A difficulty presents itself in the case of seizure of goods on or from the person of the judgment-debtor. If the judg-

117. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

118. If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register —

- (a) the number and description of the animals ;
- (b) the day and hour on and at which they were committed to his custody ;
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody ; and shall give such attaching officer or subordinate a copy of the entry.

119. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continue, according to the scale prescribed under section 12 of Act No. 1 of 1871.

And the sum so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act.

120. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

121. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which

ment-debtor refuses to deliver the goods on his person on demand by the officer making the attach-

the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

122. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale ; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118.

123. For the safe custody of moveable property other than livestock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

124. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

125. The fee for the services of each such person shall be payable in the manner prescribed in rule 116. It shall not be less than two annas, and shall ordinarily not be more than three and a half annas per diem. The Court may at its discretion allow a higher fee ; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

126. Where the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him ; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge. Provided that, where the amount does not exceed Rs. 5, it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

127. When in consequence of an order of attachment being withdrawn or for some other reasons, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

128. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

129. When any sum levied under rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

ment, seizure of the goods from the person will also mean a touching of the person; and the touching amounts to an arrest. The warrant of attachment does not authorise the touching or arrest of the person of the judgment-debtor and, for instance, when the judgment-debtor is a woman, it cannot authorise it. The remedy seems to be,¹ where the judgment-debtor is liable to arrest under the same decree, the Court should issue not only an attachment of the moveables but also the arrest of the person, in which case the seizure may, it seems,

1. The following passage from FREEMAN ON EXECUTIONS, is very instructive in the matter.

In speaking of what may be distrained for rent, Lord Coke said: "It must be of a thing whereof a valuable property is in somebody, and therefore dogs, bucks, does, conies, and the like, that are *ferae naturae*, cannot be distrained. Although it may be of valuable properties, as a horse, etc., yet when a man or woman is riding on him, or an axe in a man's hands cutting of wood, and the like, they are for that time privileged, and cannot be distrained." (Co. Lit. 47 a). To this the annotator has added in a note the statement that "if ferrets and nets in a warren be taken damage-feasant, it is good. But if they are in the hands of a man, they cannot be distrained any more than a horse on which a man is; nor can they be distrained if they are out of the warren." There are several English authorities in consonance with the doctrine we have stated. (*Gorton v. Falkner*, 4 Term Rep. 565; *Storcy v. Robinson*, 6 Term Rep. 139; *Sunbolt v. Alford*, 3 Mees. & W. 253; *Simpson v. Hartopp*. Willes. 513.) It is probably true that this law, providing that certain things, when in actual use, cannot be distrained, is equally applicable to levies made under execution. There might be some doubt from the early cases whether the exemption is to be attributed to the nature of the property or its use, or to the fact of its being upon the person or in the hands of its owner. Hence, while it was conceded that wearing apparel upon the person of the defendant could not be taken in execution, it was doubtful whether the same apparel could not be levied upon when not in actual use. The later cases appear to settle upon the theory that property upon a debtor's person or in his hands cannot be seized, because such seizure is liable to provoke a breach of the peace. The American cases upon this subject are very few. In California, a defendant had a bag of gold in his hand, when the same was taken from him by an officer. The propriety of this seizure being subsequently questioned, the Supreme Court said; "The coin was

legally follow the arrest. In cases where the judgment-debtor cannot be arrested in execution of that decree, no warrant of arrest can issue and there appears to be no means of effecting the seizure of the goods on his person. When therefore an application is made for the attachment of moveables on the person of a judgment-debtor who cannot be arrested under that decree, the Court will issue the warrant, taking care to direct the officer entrusted with the warrant to demand delivery of the moveables, and, if refused, to do no more than return the

contained in a bag, which was held by the plaintiff in his hand, and from its seizure thus situated the plaintiff could not claim any exemption, as he might perhaps do in reference to money upon his person. Thus situated, it was like a horse held by its bridle, subject to seizure under execution against its owner." In Massachusetts a defendant had on his person a watch. The officer asked to see the watch. When it was handed to him for inspection he broke the cord by which the watch was attached to the defendant's person, and thereafter levied upon the watch under a writ against its owner. The Supreme Court of the State treated this act of severance as entirely unjustifiable. Being initiated by a wrongful act, the levy was adjudged to be invalid, and the officer was declared to be a trespasser *ab initio*. This case probably establishes in America the doctrine that property upon the person of a defendant cannot be seized under execution. But it would seem, from the California case of *Green against Palmer*, that this rule does not extend to property which the debtor may be holding in his hand. The only ground upon which this exemption from levy can be justified is that otherwise the officer would be authorized to commit a trespass upon the person of the defendant, and thereby to provoke a breach of the peace. We are unable to understand why this reason does not apply to a thing held in the defendant's hand, or to a horse on which he is riding, as well as to a watch attached to his neck by a cord. With respect to property upon the person of the defendant, its exemption from levy while so situated is founded upon the danger that the power to seize and search the person of a defendant, while acting under civil process, might be grossly abused. Hence, it has been held that an article of personal ornament cannot, under a writ of replevin, be taken from the person of a defendant without his assent. The exercise of such a power is not only contrary to right and unsupported by authority, but it is also inconsistent with sound policy. Practical jurisprudence looks, in the application of remedies, to the peace, good order, and decorum of society. The evils which would

warrant as unexecuted. In England the sheriff may not legally take goods from the person of the judgment-debtor.¹

Agricultural
produce.

Growing crops are moveable property under the Code of Civil Procedure.² If like other moveable property an attachment of growing crops were to be by actual seizure and removal of the crops from the fields, that would mean injury to both parties and until the crops are ripe for use they cannot be handled. Accordingly a more feasible mode of attachment has been substituted in the case of growing crops :

“ Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

flow from the unrestricted use of a civil process to search the person, and to seize from it articles of dress or use or ornament, are obvious and manifold. It would bring the officer of law in direct contact with the citizen, under circumstances well calculated to excite irritation and anger, and lead directly to breaches of the peace. It would place in the hands of wicked and evil-disposed persons the means of annoyance and injury, and the power to interfere wantonly and without just cause with the most sacred rights of the person. If the right exists at all, it cannot be limited to particular articles of use or adornment, but must extend to every article of apparel worn by persons of either sex, and might be lawfully exercised at the sacrifice of decency and the proprieties of life.

1. *Sunbolf v. Alford*, (1838) 3 M. & W. 248; *Storey v. Robinson* (1795) 6 Term Rep. 138.

2. C.P.C., S. 2 (13).

and another copy on the outer door or some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.”¹

“(1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered. (2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree. (3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

1. Ibid, O. 21, r. 44.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment. (5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.”¹

Debts, shares
etc.

Actual seizure is also not possible in the case of debts, shares or other property not in the possession of the judgment-debtor. In such cases the attachment is effected by prohibitory orders.²

“(1) In the case of——

- (a) a debt not secured by a negotiable instrument,
- (b) a share in the capital of a corporation, or
- (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,——

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

1. C.P.C., O. 21, r. 45. For rules made in Lower Burma, see end of this Chapter.

2. A prohibitory order does not amount to seizure within Art. 29 of Indian Limitation Act, 1908 ; *Yellammal v. Ayyappa*, (1914) 38 Mad. 972.

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house, and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and payment shall discharge him as effectually as payment to the party entitled to receive the same.”¹

This rule, and not rule 44 or 45, applies to the attachment of agricultural produce in the hands of a third party.²

“ Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.”³

“ (1) Where the property to be attached is the salary or allowances of a public officer or of a

Joint interest
in moveables,

Salary of
public officer.

1. C.P.C., O. 21 r. 46 (=Old Code, S. 268). As to rules in Lower Burma, see end of this Chapter. As to the procedure to be followed see next Chapter.

2. *Bikchand v. Sajandas*, (1922) 15 S.L.R. 128=64 I.C. 1007.

3. C.P.C., O. 21 r. 47.

servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may, by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of railway company carrying on business in any part of British India or local authority in British India;

and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.”¹

Under the Code of 1882, the salary of a public officer or a railway servant could not be realised in execution, unless the disbursing officer was within the local limits of the jurisdiction of the Court of execution.² The present rule removes the inconveniences of such process and substitutes an easier and less expensive one and such salary can now be attached by an order directed to the disbursing officer, whether he and the judgment-debtor are within or without the limits of the Court ordering attachment. The party to whom the order is so directed, be it the Government, Railway Company or other local authority, must return the order as directed in clause (2), failing which he will be liable for such sum as should have been stopped out of the judgment-debtor's salary.³ No order can be made without bringing the Government on record.⁴

“Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Property in the custody of Court or public officer.

Provided that, where such property is in the custody of a Court, any question of title or priority

1. C.P.C., O. 21 r. 48. cf. Army Act, (1881) 44 and 45 Vic. c. 58, s. 151 (3). For the attachable proportion, see C.P.C., S. 60 (i).

2. *Rango v. Balkrishna*, (1888) 12 Bom. 44 ; *Sayadkhan v. Davies*, (1904) 28 Bom. 198 ; *Abdul Gafur v. Albyn*, (1903) 30 Cal. 713 ; *Oakes & Co. v. Discarcie*, (1910) P.R. 10=5 I.C. 802.

3. *Niadar v. Biddulph*, (1912) P.R. 93=14 I.C. 737.

4. *Ibid.*

arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.”¹

Decree-debt.

“(1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,

(a) if the decrees were passed by the same Court, then by order of such Court, and,

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (2) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed, to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

1. C.P.C , O. 21, r. 52 (=Old Code, S. 272).

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way ; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached ; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.”¹

1. C.P.C. O. 21, r. 53 (=Old Code, S. 273).

The following sub-rule has been added in *MADRAS* :

53 (c). If the decree sought to be attached has been sent for

Decrees for money.

Decrees are declared to be property attachable and saleable. Under the general rule therefore a decree, after attachment, must be sold, like any other property. Under the Code of 1882, a distinction was made between decrees for payment of money and other decrees and in the case of the former, sale of the decree was prohibited and a special mode of realisation by execution of that decree was prescribed leaving all other decrees to be sold in the usual course. But on the question whether decrees for sale on mortgages were decrees for money or not, there was a conflict of opinion.¹ The present Code sets aside the conflict and declares such decrees as on a par with pure decrees for money. The result is that when decrees are attached, decrees for payment of money² or for sale in enforcement of a mortgage or charge must be realised only in the manner prescribed and not by the general rule of sale,³ and all other decrees, such as for partition,⁴ foreclosure,⁵ and specific performance &c., fall under the general process of sale.

But for the attachment of a decree to be effective, the decree must have been passed, that is,

execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it.

1. See *Vaidhinadasamy v. Somasundaram*, (1905) 28 Mad. 473 (they were); *Delhi & London Bank Ltd. v. Partab Singh*, (1906) 28 All. 771 (they were not).

2. *Sultan v. Gulzari*, (1880) 2 All. 290; *Tiruvengada v. Vythilinga*, (1883) 6 Mad. 418; *Jotindro v. Dwarkanath*, (1893) 20 Cal. 111; *Sidlingappa v. Shankarappa*, (1903) 27 Bom. 556.

3. *Vithaldas v. Subraya*, (1920) 22 Bom. L.R. 1304 = 59 I.C. 541.

4. *Gopal v. Joharimal*, (1892) 16 Bom. 522.

5. *Barhma v. Bajilal*, (1904) 26 All. 91.

the right sought to be attached must have been settled by the decree.¹ Where therefore on the reversal of a decree for possession A is directed to restore possession to B with profits the order for mesne profits passed in favour of B is not attachable as a decree in execution of a decree obtained against him, for it is not a right settled by the decree but one only arising from the decree by way of restitution.²

“ (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge. Immoveable property.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.”³ Rent payable in respect of Shrotriem villages is revenue within the meaning of this rule.⁴

“ Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.”⁵ Negotiable instruments.

1. The decrees need not have been drawn up, *Ram Kanai Pal v. Purna Chandra*, (1921) 34 C.L.J. 494=65 I.C. 650.

2. *Vasudeva v. Narayana*, (1901) 24 Mad. 341.

3. C.P.C., O. 21 r. 54 (=Old Code S. 274).

4. *Ramidimarri Ganamma v. Kotireddi*, (1923) 46 Mad. 736.

5. C.P.C., O. 21, r. 51 (=Old Code, S. 270).

Coin and
currency
notes.

“Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.”¹

Cessation of
attachment on
satisfaction of
decree.

“Where (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or (b) satisfaction of the decree is otherwise made through Court or certified to the Court, or (c) the decree is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.”²

1. C.P.C., O. 21, r. 56 (=Old Code, S. 277).

2. C.P.C., O. 21, r. 55 (=Old Code, S. 275).

The rule has been thus modified in *ALLAHABAD*:

55. (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under section 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where—(a) the amount decreed (which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1), with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or (b) satisfaction of the decree (including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1), is otherwise made through the Court or certified to the Court, or (c) the decree (including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1), is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule,

An order of adjudication in insolvency of the judgment-debtor is good against an attaching creditor and the attachment ceases to affect the property during the pendency of the order of adjudication and vanishes finally when the debtor is discharged.¹

Cessation of attachment

When a judicial sale takes place, all attachments effected on the property fall to the ground and the property so sold cannot be sold again at the instance of another decree-holder though he had attached the property before the attachment in pursuance of which the property was sold.² When the same property has been attached in execution of two money-decrees and brought to sale under the later attachment, the sale is unaffected by the existence of the prior attachment in the other suit and the prior attachment falls through on the sale. So where in pursuance of a prior decree on a mortgage, the property attached under a subsequent decree is sold, the later attachment vanishes and the attaching creditor's right of redemption comes to an end with it.³ "Attachments preventing alienations by the judgment-debtor are granted solely for the purpose of protecting the attaching creditor's right to bring to sale in execution the right, title, and interest in the attached property of the judgment-debtor; and they do not continue to affect the attached property in any way, when the interest of the judgment-debtor is no longer realisable in execution of the

Cessation of attachment on judicial sale.

1. *Errikullappa Chetty v. Official Assignee of Madras*, (1915) 39 Mad. 903; *Raghunath Das v. Sundar Das*, (1914) 42 Cal. 72 P.C.

2. *Kashynath Roy v. Surbanand Shaha*, (1885) 12 Cal. 317; *Harnandan v. Prannath*, (1921) Pat. 205=61 I.C. 922; *Abdul Hakim v. Ulfat Husain*, (1920) 2 U.P.L.R. 106=55 I.C. 558; *Chamiyappa Taragan v. Rama Iyer*, (1921) 44 Mad. 232; *Venkatasami Naidu v. Gurusami Iyer*, (1920) 38 M.L.J. 441=55 I.C. 626.

3. *Chamiyappa Taragan v. Rama Iyer*, (1921) 44 Mad. 232 (239).

creditor's decree, because it has passed by a court sale to an auction-purchaser who with his assigns takes it free from the attachment and with unrestricted rights of alienation."¹

Cessation of attachment on decree-holder's default.

"Where any property has been attached in execution of a decree, but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."² Where the execution proceedings have been transferred to the Collector, he has power to dismiss the application under this rule and thereupon the attachment will cease.³

What is default.

The provisions of this rule that the attachment should cease on dismissal of the application for execution must be strictly construed.⁴ They do not apply unless the dismissal was on the ground of default on the part of the decree-holder.⁵

The word 'default' is not confined to failure to appear or to pay process fees or to produce documents, but includes other acts of negligence or disobedience, such as failure to issue or serve a notice under O. 21, r. 66. On such default the attachment ceases, even though the Court and parties intended that the attachment should subsist,⁶ because

1. Per Wallis J., in *Chamiyappa Taragan v. Rama Iyer*, (1921) 44 Mad. 232; *Kashy Nath v. Surbanand*, (1886) 12 Cal. 317.

2. C.P.C., O. 21, r. 57.

3. *Shankar Rao v. Manik Rao*, (1923) Nag. 18.

4. See *Aziz Bux v. Kaniz Fatima Bibi*, (1912) 34 All. 490; *Valiakath Puthiah v. Manakkal Parameswaran* (1915) 35 I.C. 240.

5. *Ibid.* *Syed Muhammad v. Mt. Wazir Bibi*, (1918) Pat. 353=48 I.C. 786.

6. *Namuna v. Roshan Miah*, (1911) 38 Cal. 482; *Jaikrishna v. Bibi Soghra*, (1923) 4 Pat. L.T. 418=71 I.C. 881; *Lakhpatt Rai v. Mayya Lal*, (1924) 75 I.C. 824.

Courts are not entitled to reserve a right against a plain provision of law.¹ The default must occur in the discharge of some obligation laid on the decree-holder by the Code or the rules framed under it. When the omission to attend the sale and bid at the sale were the grounds on which the application was dismissed, the attachment did not cease with the dismissal.²

In *Dildar Hussain v. Sheo Narain*,³ in execution of a decree the whole of a house was sold by auction instead of a share therein which alone was saleable in execution of the decree. Various objections were raised and in the end the Court executing the decree passed the following order:—“The sale is set aside; the application for execution is struck off. The attachment will remain.” Further applications were made for the execution of the decree, but they did not relate to the house in question. As the result of these execution proceedings the decree was satisfied in part and the papers were sent back to the Court which passed the decree. Later on, the decree-holder applied for the execution of the decree by sale of a part of the house. In the interval between this application and the time when the decree was sent back to the Court which passed it, the judgment-debtor had sold the property to the plaintiffs. The plaintiffs objected to the application for execution that they were the owners of the house and it was not saleable. It was held that the attachment had come to an end on the

1. *Valiakath Puthiah v. Manakkal Parameswaran*, (1915) 35 I.C. 240.

2. *Venkateswarayyan v. Aswatha Narayanan*, (1923) 45 M.L.J. 315=75 I.C. 491.

3. (1919) 41 All. 157; dissenting from *Karaturi Satyanarayana v. Gopisetti Narayana Swami*, (1916) 38 I.C. 300 and *Valiakath Puthiah v. Manakkal Parameswaran*, (1915) 35 I.C. 240.

decree-holder's application being struck off, and that a good title had passed to the plaintiffs by the sale. It was said that the word "default" used in order XXI rule 57 of the Code is not restricted to default of appearance or matters of that description, but means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold.

A mistaken idea that a prior attachment subsisted though the execution petition was dismissed will not avail against the express effect of dismissal under this rule. But when the mistake is bona fide, the application may be amended by adding a prayer for attachment.¹

Effect of
'striking off'
application.

Unless an order of attachment is withdrawn or dealt with on the merits, the presumption is it is subsisting.² An attachment is not necessarily at an end, because the execution case is dismissed or struck off the file.³ The striking of an execution proceeding off the file is not an order known to the law.⁴ It is an act which may admit of different

1. *Vecraraghava v. Mallikarjuna*, (1914) 1 L. W. 665=25 I.C. 883.

2. *Raghavachariar v. Ananthareddi*, (1916) 31 I.C. 911; *Daud Ali v. Ram Prasad*, (1915) 37 All. 542. See *Qamaruddin v. Jawahir Lal*, (1905) 27 All. 334 P.C.

3. *Jugobundhoo v. Bhugwan*, (1871) 17 W. R. 15; *Bank of Upper India v. Sheo Prasad*, (1897) 19 All. 482; *Imtiaz v. Bishambhar*, (1911) 8 A.L.J. 619=10 I.C. 245; *Mahadeo v. Hyder*, (1910) 8 I.C. 727; *Raghavachariar v. Ananthareddi*, (1915) 31 I.C. 911; *Jagadish v. Rama Sundara*, (1919) 23 C.W.N. 608=51 I.C. 972. See *Ganpati Bhatta v. Devappa*, (1923) Bom. 30=76 I.C. 895.

4. *Biswa Sonar v. Binanda Chunder*, (1884) 10 Cal. 416; *Mohunt Bhagwan v. Khetlar*, (1897) 1 C.W.N. 617; *Donkal v. Phakkar*, (1893) 15 All. 84; *Seetharama v. Krishna Rao*, (1912) M.W.N. 407=15 I.C. 406.

interpretations according to the circumstances of the case.¹

If the Court consigns the records to the record room² or struck off the execution proceedings for its own convenience, that is, statistical purposes only,³ such as pending an order of stay or of injunction⁴ or pending appeal⁵ or investigation of claim,⁶ or because the necessary records are not available,⁷ the attachment does not fall to the ground and a fresh application for execution must be treated as a continuation of the prior one.⁸

Where it is not a cessation of attachment.

The question whether a particular attachment

1. *Rajah Muhesh Narain v. Kishanund*, (1862) 9 M.I.A. 328 (337); *Zahuran v. Tayler*, (1868) 2 B.L.R. 86; *Rangasami v. Periasami*, (1897) 17 Mad. 58; *Srinivasa v. Sami Rau*, (1893) 17 Mad. 180; *Chintaman v. Balshastri*, (1891) 16 Bom. 294; *Yakub Ali v. Durga*, (1915) 37 All. 578; *Seetharama v. Krishna Rau*, (1912) M.W.N. 407=15 I.C. 406; *Karaturi Satyanarayana v. Gopisetti Narayanaswami*, (1916) 38 I.C. 300; *Diwan Chand v. Bedha*, (1919) P.R. 154=52 I.C. 294; *Ganapati v. Devappa*, (1923) Bom. 30. See Vol. I, 481 for limitation on pending applications.

2. *Diwan Chand v. Bedha*, (1919) P. R. 154=52 I. C. 294; *Narendra v. Ganga Sagar*, (1920) 23 O.C. 166=57 I.C. 509.

3. *Dacosta v. Kalu Pershad*, (1869) 12 W.R. 260; *Subramania Pattar v. Appu Mudaliar*, (1920) 11 L.W. 42=55 I.C. 526; *Baroda Sundari v. Fergusson*, (1882) 11 C.L.R. 17; *Lalka Singh v. Gursaran Lal*, (1919) 6 O.L.J. 656=54 I.C. 426.

4. *Chuman Lall v. Doman Lall*, (1868) 9 W.R. 205; *Soonder v. Mt. Buhooria*, (1875) 24 W.R. 36; *Seetharama v. Krishnarau*, (1912) 15 I.C. 406; *Valiakath Puthiah v. Thachar*, (1915) 3 L.W. 601=35 I.C. 240. See also *Chalavadi Kotiah v. Paloori Alimelammah*, (1907) 31 Mad. 71.

5. *Shew Narain v. A. B. Miller*, (1872) 17 W.R. 234.

6. *Krishna Doss v. Mahomed Mian*, (1912) M.W.N. 810=16 I.C. 484; *Satya Narayana v. Narayanaswami*, (1917) 21 M.L.T. 88=38 I.C. 300; *Nilkanta v. Gosta Behari*, (1918) 27 C.L.J. 145=44 I.C. 249.

7. *Raghubans v. Sheo Sarangir*, (1863) 5 All. 243. See *Har Sarup v. Balgobind*, (1895) 18 All. 9.

8. *Subramania v. Appu*, (1920) 11 L.W. 42=55 I.C. 526.

subsists is a question of intention.¹ When on the date fixed for sale the judgment-debtor paid a portion of the debt and the sale was with the decree-holder's consent put off on the express condition that the attachment should continue, the striking off of the proceedings would not efface the attachment.² So will it be when it appears that it was the intention of the Court or of the parties that the attachment should continue.³

If rents payable to the judgment-debtor are attached and the Court orders execution by directing the tenants to pay the rents to the decree-holder, in such a case if the property remains under attachment, the order for execution is not exhausted merely because the application is afterwards struck off. So if the decree-holder (on non-payment by the tenants) applied to the Court for an order on them to pay the rents in arrears, no question of limitation arises, as the execution proceedings are deemed to be pending and the Court is merely asked to give effect to its previous order for execution which still in point of law subsists.⁴

When an application was made for sale of a debt but the applicant failed to pay the warrant fees, because the sale had been stayed by an order

1. *Subbachariar v. Muthuveeran Pillai*, (1912) 36 Mad. 553; *Karaturi Satyanarayana v. Gopisetti Narayanaswami*, (1917) 38 I.C. 300.

2. *Sheik Golam v. Mt. Shama Sundari*, (1869) 12 W.R. 142; *Mungal v. Grijakant*, (1882) 8 Cal. 51 P.C. See *Mahomed Mubarak v. Sahu Bimal Prasad*, (1922) 44 All. 274.

3. *Ahmud v. Mahamed*, (1865) 1 N.W.P. 48; *Zaibunissa v. Jairab Gir*, (1878) 1 All. 616. See also *Mookhesur v. Ramphul*, (1869) 5 N.W.P. 70.

4. *Radha Kishore v. Aftab Chundra*, (1881) 7 Cal. 61; *Jibhai Mahipati v. Parbhu Bapu*, (1875) 1 Bom. 59; *Jitmal v. Jwala Prasad*, (1898) 21 All. 155.

of the High Court, and the petition was consequently 'struck off,' it was held that the order simply amounted to an adjournment *sine die*, for even if the fees had been paid, the Court could not have proceeded with the sale by reason of the stay.¹

If property is once attached, the attachment will subsist if not expressly abandoned by the party at whose suit it was made until an order is issued for its withdrawal, even though no further steps are taken on the attachment within a reasonable period.² If an execution case is struck off with the consent of the judgment-creditor or in such manner as the law provides or if the judgment-creditor subsequently applies of his own accord for a second attachment treating the first as non-existent, then, the first must be deemed to have been abandoned.³ If on the contrary the judgment-creditor did not intend to abandon his first attachment and takes out the second attachment, merely because the Court insists on his beginning *de novo*, (or in ignorance of the subsistence of the first attachment), then the 1st attachment remains in force notwithstanding the issue of the second.⁴ But when the first attachment ceased to exist as a matter of law, the subsisting attachment is only the later one.⁵

Generally if an execution application is struck off with the consent of the decree-holder, the at-

1. *Seetharama v. Krishnarow*, (1912) M.W.N. 407=15 I.C. 406.

2. See *Alwar Chetty v. Povala Varadappa Naicker*, (1912) 16 I.C. 387.

3. *Jhatu Sahu v. Babo Ram*, (1869) 11 W.R. 517; *Hafiz v. Abdullah*, (1894) 16 All. 133.

4. Ibid. *Kurucha Ganga Naidu v. Kovvuri Basava Reddy*, (1913) 13 M.L.T. 145=18 I.C. 691.

5. *Krishna v. Janakiram*, (1915) 19 C.L.J. 248=29 I.C. 149.

attachment must be deemed to have ceased. But in a case,¹ where a claim was preferred in respect of an attached property, the decree-holder's vakil stated "that he would file a fresh application as the claim petitions are pending" and the execution petition was struck off. The decree-holder filed a suit for declaring the property liable for attachment and made an application for execution more than three years after the date of the previous application. It was held that the attachment subsisted and the application was not barred. The Court said that Order 21 rule 57 did not apply in terms to the facts of this case, that the undertaking to file another application was not conclusive against the order and apart from the circumstances in which the order was passed or the possible intention of the Court and the parties, there was an independent reason for deciding in favour of the decree-holder as he was prevented from having recourse to the Court until he had secured a decision in his favour against the order allowing the claim.²

It may not be possible to follow the reasoning adopted in the case, for in the absence of a better and clearer note by the Judge, who struck off the execution on the representation of the decree-holder's vakil, the order could only mean that the presence of the claim was an impediment to his prosecution of the execution application and that while it was in the ordinary course his duty to face the claim and to let the Court pass an order summarily under Order 21 rule 63, his action would amount only to an unwillingness to prose-

1. *Jhatu Sahu v. Babo Ram*, (1869) 11 W.R. 517.

2. *Karaturu Satyanarayana v. Gopisetti Narayanasami*, (1917) 5 L.W. 204=38 I.C. 300.

cute the petition. When on such an expression of the attitude of the decree-holder, the application was struck off, it clearly meant a dismissal of the application under Order 21 rule 57 and the attachment would cease, with the consequence that there was no need or occasion for the claim petitions to be dealt with, though the Court would have still the power at that stage to adjudicate on the claim, if the claimant pressed for it. It follows therefore that the attachment having ceased on such an order the subsequent application would be out of time. The learned Judges however inferred an intention not to dismiss the application.

When an application is struck off the file for non-payment of batta for sale-processes,¹ when the execution has been set aside in toto,² when the suit is dismissed,³ when parties directed to appear do not appear,⁴ because the proclamation copies were not filed,⁵ in all these cases the attachment ceases and an alienation by the judgment-debtor after that date and before a fresh attachment is good.⁶ Where a decree-holder in execution of a decree attached the properties of the judgment-debtor but subsequently accepted a payment made by him towards the satisfaction of the decree and agreed to give time for payment of the balance of the decree amount and

Where it is a cessation of attachment.

1. *Purbhoo v. Goma Bhujun*, (1866) 5 W.R. Mis. 4 ; *Yellampalli Venkatappa v. Natam Manjappa*, (1917) 4 L.W. 112=35 I.C. 594.

2. *Khadar Hussain v. Kalu Pershad*, (1867) 8 W.R. 49.

3. *Lucheetut v. Humphrey*, (1870) 14 W.R. 101.

4. *Krishna v. Janakiram*, (1915) 19 C.L.J. 248=29 I.C. 149.

5. *Mandhyan v. Badram*, (1913) 17 C.W.N. 204=18 I.C. 441.

6. *Krishna y. Janakiram*, (1915) 19 C.L.J. 248=29 I.C. 149 ; *Bhagwan Lal v. Rajendra Prasad*, (1923) 4 Pat. L. T. 409=77 I. C. 1.

the Court dismissed the application after recording part payment, the attachment ceased to exist.¹

Rule under
the C. P.
Code of 1908.

The Code of 1908 expressly provides for dismissal of an execution application in default of prosecution. Until that step is taken and final orders are passed, the application must be deemed to be pending.² Where an execution petition asked for certain specific reliefs which were all granted but the application itself was not disposed of by a final order, it must be deemed to be pending so as to entitle the decree-holder to ask for other reliefs on the same application;³ because the mere fact that the decree-holder asked only for certain reliefs does not preclude him from asking at a later stage of the same application, for other modes of satisfying the decree.⁴ When, after a claim to certain jewels by the mother of the judgment-debtor had been dismissed, the decree-holder applied for proclamation and sale without a prayer for production as he ought to have done and when the Court ordered notice to the mother to produce them and the petition was dismissed for non-payment of batta, the attachment did not terminate with the dismissal of the petition.⁵

This provision of cessation applies only to orders of dismissal of execution application passed after the new Code came into operation. An attachment in

1. *Jaikrishna v. Bibi Soghra*, (1923) 4 Pat. L.T. 418 = 71 I.C. 881.

2. *Rajah of Karvetnagar v. Venkatarreddi*, (1915) 39 Mad. 570.

3. See *Bommaraju Venkata Perumal v. Subramanya Nayani Varu*, (1915) 31 I. C. 87; *Venkatamma v. Manikam Nayani Varu*, (1914) 16 M.L.T. 399 = 26 I.C. 244.

4. *Rajah of Karvetnagar v. Venkatarreddi*, (1915) 39 Mad. 570.

5. *Peddi Venkata Subbiah v. Tangatoor Subbiah*, (1915) M.W. N. 149 = 28 I.C. 62.

pursuance of an execution application which was subsisting in 1909 does not cease by the mere dismissal of the application after the new Code came into force.¹

An attachment once made is revived where the sale held in pursuance of it is reversed,² where an order setting aside an ex parte decree followed by striking off the execution proceedings, was reversed on appeal,³ where the order of striking off the proceedings is reversed on appeal,⁴ where the right of attachment is established by a decree in a regular suit,⁵ or where the execution petition is restored on review.⁶

When an execution sale is set aside for any reason other than default on the part of the decree-holder the attachment which had been obtained prior to the first sale revives to support a subsequent

1. *Vardiparthi Ramayya v. Kosrukonda Jagannadham*, (1915) 27 I.C. 568; *Khandi Subbayya v. Nadra Subba Reddi*, (1915) 2 L.W. 4=27 I.C. 792. See also *Raghavachariar v. Ananthareddi*, (1915) 31 I.C. 911.

2. *Raja Mohesh Narain v. Kishnarund*, (1862) 9 M.I.A. 324; *Gunno v. Baboo Muddun*, (1864) W.R. 26; *Mt. Kanio Zohara v. Rai Syam Kishen*, (1917) 2 Pat. L.J. 115=39 I.C. 89. See also *Keshawesarindra v. Debendra Bala*, (1919) 4 Pat. L.J. 213=48 I.C. 245.

3. *Sheik Gulam v. Mt. Shama Sundari*, (1868) 12 W.R. 142; 5 C.W.N. 347.

4. *Bank of Upper India v. Sheo Prasad*, (1897) 19 All. 482.

5. *Mahomed v. Pitambar*, (1874) 21 W.R. 435; *Bonomali v. Prosunno*, (1895) 23 Cal. 829; *Ganesh v. Bhikaji*, (1886) 10 Bom. 400; *Ali Ahmad v. Bansi Dhar*, (1909) 31 All. 367; *Suppa Reddiar v. Avudaiammal*, (1905) 28 Mad. 50 F.B.; *Shibdas v. Ramanath*, (1921) 61 I.C. 817; *Manyam Subbayya v. Sunkaravalli Venkataratnam*, (1923) 47 Mad. 176. See also *Pethu v. Sankara Narayana*, (1917) 32 M.L.J. 374=33 I.C. 778.

6. *Azis v. Fatima*, (1912) 34 All. 490; *Arunachalan v. Mantha* (1920) 55 I.C. 707; *Harlal v. Narayan*, (1922) 18 N.L.R. 152=64 I.C. 420; *Mohamed v. Pitambar*, (1874) 21 W.R. 435.

application for execution and no fresh attachment is necessary.¹ But when execution proceedings are dismissed for default of decree-holder, then the attachment ceases and the revival of execution proceedings does not operate to revive the attachment so as to prejudice the rights of strangers who have acquired title in the interval.

An application to revive a prior execution application, is governed by Art. 181 of the Limitation Act, 1908.²

An attachment before judgment comes to an end when the suit is dismissed. In order to avoid all possible doubt and difficulty, the Court should when dismissing a suit make an order under Order 38 rule 9 of the Code withdrawing the attachment. When the attachment ceases by the dismissal of the suit, it does not revive when an appeal is lodged.³

Effect of
seizure.

By the act of seizure, the property seized is taken out of the order and disposition of the execution-debtor,⁴ and out of his apparent possession,⁵ and any dealing with it after the seizure is void as against the claim of the attaching creditor.⁶

The consequence of the seizure is to place the goods in *custodia legis* and that is for the benefit

1. *Mahabharat v. Surja Kanta*, (1918) 3 Pat. L.J. 310=45 I.C. 589.

2. See Vol. I. 480. *Akhtar Husain v. Qudrat Ali*, (1923) 26 O. C. 206; *Patring Koor v. Malavanand*, (1911) 16 C.W.N. 332=12 I.C. 65; see also *Mahabharat v. Surjakanta*, (1918) 3 Pat. L.J. 310=45 I.C. 589.

3. *Abdul Rahman v. Amir*, (1918) 45 Cal. 780.

4. *Fletcher v. Manning*, (1844) 12 M. & W. 571; *Re Baldwin*, (1858) 2 De. G. & J. 230 C.A.

5. *Re Brenner*, (1881) 16 Ch. D. 668 C. A.; see contra *Re Cole*, (1872) 14 Eq. 178.

6. C. P. C., S. 64.

of those who are by law entitled.¹ The seizure is not a satisfaction of the decree-debt even to the value of the goods seized,² but is said to be a *pro-tanto* discharge.³ It does not efface the ownership of the judgment-debtor,⁴ and no property in goods passes thereby to the execution-creditor.⁵

“The defendant's rights in the property are so far extinguished as to prevent his making any disposition of it which would interfere with its subjection to the payment of the plaintiff's demand, when that shall have been legally perfected, but for every purpose of making any demand which may be necessary to fix the garnishee's liability to him or of securing it by legal proceedings or otherwise his rights remain unimpaired by the pending garnishment, but, of course, can be exercised only in subordination to the lien thereby created.”⁶

Effect of
garnishment.

The service of the order of garnishment binds the debts specified in the hands of the garnishee, if they exist at that date.⁷ The judgment-creditor does not thereby become a creditor of the garnishee in respect of the debts,⁸ but he at once⁹ acquires a right over them,¹⁰ entitling him to prevent the

1. *Giles v. Grover*, (1832) 1 Ch. & F. 72 H. L.; *Union Bank of London v. Lenanton*, (1878) 3 C.P.D. 243 C.A.

2. *Lee v. Dangar, Grant & Coi.*, (1892) 1 Q.B. 231; affirmed (1892) 2 Q.B. 337 C.A. See, for the distinction between seizing and selling, *Lvisdowie v. Connor*, (1889) 24 L.R. Cr. 50.

3. *Ex parte Smith*, (1902) 2 K.B. 260 C.A.

4. *R. Bird*, (1680) 2 Show 87; *Re Clarke*, (1898) 1 Ch. 336 C.A.

5. *Giles v. Grover*, (1832) 1 Cl. & Fin. 72.

6. Drake on ATTACHMENT, Section 453.

7. *Webb v. Stenton* (1882) 11 Q.B.D. 518 C.A.

8. *Norton v. Yates*, (1906) K.B. 112.

9. *Cairney v. Back*, (1906) 2 K.B. 746.

10. *Galbraith v. Grimshaw and Barter*, (1910) A.C. 508; *Chatterton v. Watney*, (1881) 17 Ch. D. 259 C.A.

garnishee from paying his creditor.¹ But the sum cannot be paid over to him unless the order is made absolute and a payment to the judgment-creditor on the order *nisi* alone would be a voluntary payment.² Such a payment is not good as against a trustee in bankruptcy of the judgment debtor, the payment being made without compulsion of law.³ The order operates only over the extent of the judgment-debtor's interest at that date and no more and is therefore subject to all charges,⁴ liens⁵ (including the garnishee's own)⁶ and other equitable charges,⁷ existing at that date.

But where by the order *nisi*, all debts owing and accruing to the judgment-debtor are attached, all the funds in the hands of the garnishee are attached, although the funds may be largely in excess of the judgment-debt, unless the order is restricted in its operation to such amount as will satisfy the judgment-debt.⁸ When the amount of the debt due from the garnishee is in excess of the judgment-debt, an assignment of the excess by the

1. *Re Watt*, (1878) 8 Ch. D. 327 C.A.; *Re Combined Weighing and Advertising Machine Co.*, (1889) 43 Ch.D. 199 C.A.

2. *London Corporation v. London Joint Stock Bank*, (1883) 6 A.C. 393 (415). See also *O'Donovan v. Dillon*, (1889) 24 L.R.Ir. 442.

3. *Re Webster*, (1907) 1 K.B. 623.

4. *Re General Horticultural Co.*, (1886) 32 Ch. D. 312; *Davis v. Freethy*, (1890) 24 Q.B.D. 519.

5. *Shippey v. Grey*, (1880) 49 L.J. Q.B. 524 C.A.; *Faithfull v. Ewen*, (1878) 2 Ch.D. 495 C.A. (solicitor's special lien); *The Leader*, (1868) 2 A. & E. 314 (proctor's lien); *Webster v. Webster*, (1862) 31 Beav. 893 (army agent's lien).

6. *Nathan v. Giles*, (1814) 5 Taunt. 558; *Caila v. Elgood*, (1822) 2 Dow. & Ry. 193.

7. *Badeley v. Consolidated Bank*, (1888) 38 Ch. D. 238 C.A.; *Cole v. Eley*, (1894) 2 Q.B. 180; *Re London Pressed Hinge Co. Ltd.*, (1905) 1 Ch. 576 (581); *Levene v. Matou*, (1907) 51 Sol. Jo. 532.

8. *Rogers v. Whiteley*, (1893) A.C. 118.

judgment-debtor after service of the order *nisi* on the garnishee is valid as against a second judgment-creditor who serves a garnishee order *nisi* on the garnishee after the assignment.¹

Though the issuance and service of writ is anticipated, the garnishee may make lawful payment of debts or deliver property to the judgment-debtor until service upon him has been made.²

A floating charge upon the assets of a company secured by debentures³ takes priority, though the receiver and manager is appointed after service of the order *nisi*,⁴ or even after the order was made absolute.⁵ Payment to the judgment-creditor by the garnishee though with notice of the debenture holder's claim will however be a good discharge to the garnishee, if no receiver has been appointed and nothing has been done to make the charge effective.⁶ Where before a petition for winding up, the creditor obtains an order attaching debts due to a company and afterwards before the winding-up order obtains an order for payment, he is not liable to refund to the liquidator.⁷

The attachment of a debt only prevents the judgment-debtor from receiving payment of the debt from the garnishee, unless the claim of the attaching creditor is first satisfied. But it does not

1. *Yates v. Terry*, (1902) 1 K.B. 527 C.A.

2. *Freeman on EXECUTIONS*, III. 2210.

3. See Indian Companies Act (VII of 1913), Ss. 126—135.

4. *Norton v. Yates*, (1906) 1 K. B. 112.

5. *Cairney v. Back*, (1906) 2 K. B. 746 ; see also *Geisse v. Taylor* (1905) 2 K.B. 658.

6. *Robson v. Smith*, (1895) 2 Ch. 118 ; *Norton v. Yates*, (1906) 1 K. B. 112. See *Robinson v. Burnells Vienna Bakery Co.*, (1904) 2 K.B. 624 ; *Evans v. Rival Granite Quarry Co. Ltd.*, (1910) 26 T.L.R. 509.

7. *Ex parte Hawkins*, (1868) L.R. 3 Ch. 787.

take away the right of the judgment-debtor from suing his debtor on it or from taking any further steps for its recovery.¹ It does not operate as a transfer to the judgment-creditor of the debt or the securities for it and when the order is obtained against the mortgagor of the judgment-debtor, a subsequent mortgage has no operation upon the surplus proceeds of sale of the mortgaged estate in the hands of a prior mortgagee or a sale by him, under his power of sale, after the date of the order.²

Effect of
attachment
generally.

Attachment creates no charge or lien upon the attached property.³ It merely prevents and avoids any private alienation to the prejudice of the claim of the attaching creditor.⁴ It follows therefore that an attachment, whether before judgment or in execution gives the attaching creditor no priority as a secured creditor, as against the Official Assignee or Official Receiver in whom the estate of the judgment-debtor becomes vested on a subsequent insolvency, so that on such vesting the attachment becomes of no avail,⁵ and the attaching creditor ranks equally with other creditors only for a rate-

1. *Shib Singh v. Sitaram*, (1891) 13 All. 76; *Beti v. Collectors of Etawah*, (1895) 17 All. 198 P.C.

2. *Chatterton v. Watney*, (1889) 17 Ch. D. 259 C. A.; see also *Backhouse v. Siddle*, (1878) 38 L.T. 487; *Re Combined and Weighing Co.*, (1889) 43 Ch. D. 99 C.A.

3. *Sarkies v. Bundho*, (1869) 1 N.W.P. 172; *Soobul v. Russick*, (1888) 15 Cal. 202; *Frederick v. Madongopal*, (1902) 29 Cal. 428; *Zamindar of Karvetnagar v. Trustee of Tirumalai*, (1909) 32 Mad. 429; *Kathum Sahiba v. Hajee Badsha Sahib*, (1915) 38 Mad. 220; *Erikullappa Chetty v. Official Assignee of Madras*, (1916) 39. Mad. 303; *Ponnurangam v. Lal Khan*, (1916) 37 I.C. 348.

4. *Motilal v. Karbuddin*, (1892) 25 Cal. 179 P.C.; *Raghunath v. Sundar*, (1914) 42 Cal. 72 P.C.

5. See *Re Pearce*, (1885) 14 Q.B.D. 966; *Figg v. Moore Bros.*, (1894) 2 Q.B. 690.

able distribution.¹ But the position of the liquidator of a registered company differs from that of the Official Assignee, in that the property of the company does not vest in him on the winding-up order. An attachment therefore made on the property of the company at the instance of a decree-holder before the winding-up of the company cannot be released at the instance of the liquidator.²

"A was garnished on account of a judgment under which he was liable to W. This judgment was subsequently assigned to C, who in turn assigned it to S, receiving a sum of money in excess of the amount for which the garnishment was made. Instead of proceeding against A, to enforce any liability which might exist against him because of his garnishment, another execution was caused to be issued on the judgment and C was cited to appear in supplementary proceedings, in the theory that, in assigning the judgment which was sought to be garnished and receiving payment therefor, he had made himself liable in the place of A. In holding that this action could not be sustained, the Court said " However it may be with specific property, in the hands of the garnishee, our conclusion is that

1. *Kishnasami v. Official Assignee of Madras*, (1903) 26 Mad. 673; *Jitmand v. Ramchan*, (1905) 29 Bom. 405; *Sri Chund v. Murarilal*, (1912) 34 All. 628; *Muhammad v. Radha Mohan*, (1919) 41 All. 274; *Gopinath v. Gur. Prasad*, (1912) 15 I. C. 860; *Raghunath v. Sundardas*, (1914) 42 Cal. 72 P.C. See Presidency Towns Insolvency Act (III of 1909), S. 53; Provincial Insolvency Act (V of 1920), S. 28. But in England, by the seizure before any act of bankruptcy the execution creditor becomes secured creditor; *Slater v. Pinder*, (1872) 7 Ex. 95; *Re Clarke* (1898), 1 Ch. 336 C. A.; *Galbraith v. Grimshaw & Barter*, (1910) A.C. 500.

2. *Amritalal v. Anukul*, (1916) 43 Cal. 586; *Re Stanhope Silkstone Collieries Co.*, (1876) 11 Ch. D. 160; *Re National United Investment Corporation*, (1901) 1 Ch. 950. See Indian Companies Act (VII of 1913), Ss. 175-180.

garnishment does not give the creditor any lien upon a debt owing by the garnishee to the debtor in the action nor upon any money or property with which he may afterwards pay it. The books speak of it as *quasi lien*—such a lien as will justify the garnishee in refusing to pay his creditor until garnishment is disposed of and as will give the creditor a right of action against the garnishee for any money or property in his hands owing or belonging to the party against whom the writ runs (Wade on Attachment, section 329), but not such a lien as will enable the creditor to follow any money that may be paid thereon into the hands of third persons.”¹

It is the right of the attaching creditor to have the property attached in *custodia legis* for the satisfaction of his debt and an unlawful interference with that right constitutes an actionable wrong. If crops attached in execution of a decree are cut and carried away, the decree-holder can maintain an action for damages against the wrongdoer and can be awarded compensation, not exceeding the value of the attached property.²

Rights of
attaching
creditor.

An attaching creditor can execute under Order 21 rule 53 an attached decree, in the place of his judgment-debtor can apply to set aside a sale under Or. 21 r. 90 (1), can redeem a mortgage under S. 91; Transfer of Property Act, 1882, is entitled to rateable distribution under S. 73, and can impeach alienation under S. 64, if his claim is one enforceable under the attachment under which property is brought to sale.

1. Freeman on EXECUTIONS, III. 220.

2. C. P. C., O. 21, r. 53. *Sankaralinga v. Kandasami*, (1907) 30 Mad. 413.

Attaching creditor a representative of the judgment-debtor.

The attaching creditor is declared to be a representative of the judgment-debtor for the purpose of executing the decree obtained by the latter against a third person.¹ That is, when a decree is attached, the decree so attached can be executed by the judgment-debtor (the original decree-holder) or by his attaching creditor, as his representative. Where the decree that is being executed and the decree that is to be attached are passed by the same Court, the creditor may apply to the Court for attachment of the latter decree and either he or his judgment-debtor may then apply for execution. But where the decree sought to be attached is passed by Court A the creditor may apply to the Court B which passed his decree for attachment of the other decree held by his judgment-debtor in Court A from the Court B requesting it to stay execution of its decree, until the notice is cancelled by Court B or until an application is made by the decree-holder or the attaching creditor for execution of the decree in Court A. On such application being made, the decree will be executed and the net proceeds realised in execution applied in satisfaction of the attaching creditor's decree. The notice intimating the attachment of the decree and directing a stay as aforesaid is peremptory and operates to take away the jurisdiction of the Court so addressed. If therefore in spite of such notice, that Court executes the decree, the proceedings are invalid and a sale held in execution of that decree is void and must be set aside.² Where a decree is attached, no adjustment can be recognised by the Court.³

1. *Sah Man v. Kanagasabapathi*, (1893) 16 Mad. 20; *Krishnan v. Venkatapathi*, (1906) 29 Mad. 318. See Vol. I. 181.

2. *Barhma Din v. Baji Lal*, (1904) 26 All. 91; *Manik Lal v. Banamali*, (1905) 32 Cal. 1104.

3. *Gopal v. Jaharimal*, (1892) 16 Bom. 52. See Vol. I. 248.

Avoidance of alienation after attachment.

“Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.”¹

As against an attachment, a subsequent alienation is inoperative² and it makes no difference that the decree-holder was not prejudicially affected by the alienation.³ The purchaser pending attachment has not even a lien for part of the purchase-money paid to the judgment-debtor.⁴

Alienation must be private,

Where an attachment has been made, any private transfer of the property attached or any interest therein is void as against all claims enforceable under the attachment. Private transfer implies a voluntary act of the judgment-debtor and does not cover cases of involuntary execution of conveyances or assignments made under a decree of Court.⁵ Accordingly the vesting of the judgment-debtor's estate in the official assignee in consequence of his insolvency after the attachment cannot be prevent-

1. C.P.C., S. 64 (= Old Code, S. 276).

2. *Bindeshri Prasad v. Girdhar Das*, (1916) 34 I.C. 91; *Budhu v. Rarkat Ram*, (1920) 2 Lah. L.J. 99; *Bibi Miyakhan v. Gulab Chand*, (1911) 13 Bom. L.R. 1189=12 I.C. 923 (where an attachment was made on an application of the 2nd judgment-creditor who also applied for rateable distribution).

3. *Girija Nath v. Upendra Nath*, (1913) 20 I.C. 241; *Bishambhar Nath v. Girdhari Lal*, (1920) 23 O.C. 18=55 I.C. 481; *Syed Muhammad v. Wazir Bibi*, (1918) 48 I.C. 786.

4. *Ramkhelawan Singh v. Sunder Raut*, (1916) 34 I.C. 34.

5. *Quarban Ali v. Ashraf Ali*, (1882) 4 All. 219; *Bapineedu v. Venkaya*, (1910) 8 M.L.T. 197=7 I.C. 795.

ed and on such vesting the attachment becomes of no avail and the attaching creditor can rank only along with the other creditors in the insolvency proceedings.¹ Where during the pendency of an attachment the property is awarded to another person by arbitration, the award is not a private transfer, and as it only recognises a pre-existing title, and the attachment takes effect only subject to the award.² But when the alienation is made not in pursuance of a direction of Court, the mere circumstance that there is a prior agreement which obliges a party to carry it out by the execution of a conveyance cannot take away from it its character as a private alienation.³ If however in pursuance of a contract of sale, prior to attachment, a decree for specific performance and possession is passed, the decree will prevail against the attachment, though it may be open to the attaching creditor to impugn the whole decree as fraudulent.⁴

When pending attachment by two creditors of his rights under certain mortgages, the mortgagee assigned his rights to the 1st defendant and directed him to pay the consideration to the attaching creditor, but after the money in his hands had been attached at the instance of the plaintiff (another creditor of the assignor), it was held that the assignee was entitled to protect himself by paying off the prior attaching creditors and that such payment

1. *Sarkies v. Bundho*, (1869) 1 N. W. P. 99; *Sadayappa v. Ponnamma*, (1885) 8 Mad. 554.

2. *Kasi Visvanathan Chettyar v. Ramasawmi Nadar*, (1918) 35 M.L.J. 441 = 48 I.C. 123; *Narayana Iyer v. Biyari Bibi*, (1821) 41 M.L.J. 557.

3. *Bapineedu v. Venkayya*, (1910) 21 M.L.J. 82 = 7 I.C. 794; *Sit Pi v. Ma San*, (1909) 2 L.B.R. = 2 I.C. 350.

4. *Sunkari Sitayya v. Mudarajaddi Sanayysi*, (1924) 47 M.L.J. 361.

did not offend against the provisions of this section (64) and could not be impeached, because a direction in an assignment deed that the assignee should discharge certain debts due by the assignor to third parties out of the consideration may be revoked by the assignor at any time before actual payment, if the debts are unsecured, but cannot be so revoked if the debts are secured on the property alienated.¹

Alienation
must be
contrary to
attachment.

Unless the private transfer etc. has been contrary to an attachment, that attachment cannot prevail over the transfer. The words "contrary to such attachment" have replaced the words "during the continuance of the attachment" of the C.P. Code of 1882. The word 'contrary' to such attachment means derogatory to, interfering with or affecting or prejudicing such attachment.

The object of the prohibition is to prevent any alienation, which, if permitted, would defeat claims legally enforceable under the decree in execution of which the property alienated has been attached,² so that a private alienation of attached property made under circumstances that it in no way interferes with the rights secured by his decree to the attaching decree-holder is not affected.³ Therefore a renewal of an encumbrance existing on the property before the date of attachment⁴ or a sale under the powers of a mortgage deed after the

1. *Gopala Iyer v. Rama Venkata Subba Iyer*, (1914) 1 L.W. 977=26 I.C. 223.

2. *Dinobundhu v. Jogmaya*, (1901) 29 Cal. 154 P.C ; *Shivlingappa v. Chanbasappa*, (1906) 30 Bom. 337.

3. *Abdul Rashid v. Gappo Lal*, (1898) 20 All. 421.

4. *Mahadevappa v. Srinivasa*, (1881) 4 Mad. 417; *Dinobundhu v. Jogmaya*, (1901) 29 Cal. 154 P.C. (If the mortgage is for any higher amount, to the extent of the excess, it is voidable).

attachment¹ or a consent given by the heirs of a Mahomedan testator, whereby the latter disposes of by his will more than one-third of his property to a stranger, even if the consent is given after the property is attached in execution of a decree against the heirs,² does not amount to an alienation avoidable under the attachment.

Where therefore an alienation is made subsequent to an attachment and the judgment-debtor satisfies the debt of the attaching creditor from the sale proceeds, such an alienation cannot be said to be contrary to such attachment, for the alienation was in fact the means by which the decree in execution of which the attachment was made was satisfied and such alienation is good even against other decree holders who are entitled in the same matter to rateable distribution.³ On this principle the decree-holder can waive the benefit of this provision. If after the attachment a private alienation of the attachment is made and the decree-holder agrees to recognise the alienation and not to bring that property to sale in execution of his decree, the alienation is good.⁴

It follows therefore that an alienation of attached property is not void but voidable at the option of the attaching creditor or of persons whose claims are enforceable under that attachment.⁵

1. *Delhi and London Bank v. S.J. Tellary*, (1901) 3 Bom. L.R. 892.

2. *Daulatram v. Abdul Kayum*, (1902) 26 Bom. 497.

3. See *Annamalai v. Palamalai*, (1918) 41 Mad. 265 F.B.

4. *Nandigam Gangayya v. Madupalli Venkatramayya*, (1922) 44 M.L.J. 80=72 I.C. 839.

5. *Kamal Narain v. Sat Narain*, (1905) 2 A.L.J. 265 ; *Baldeo Pershad v. Parichat*, (1900) A.W.N. 148 ; *Anundloll v. Jullodhur*, (1870) 14 M.I.A. 543 ; *Barendra Nath v. Martin Co.*, (1921) 38 C.L.J. 7=62 I.C. 167 ; *Nathu Mal v. Ganga Ram*, (1921) 63 I.C. 108.

Attachment
must be
subsisting.

So long as the attachment subsists, the subsequent alienation is invalid against claims enforceable under it. The subsistence may be real or dormant. The attachment will subsist so long as the application for execution on which the attachment has been made has not been dismissed effectually so as to cause its cessation. Under Order 21 rule 57 C. P. Code, if an application for execution is dismissed on account of the decree-holder's default, the attachment ceases. When therefore an application for execution has not been dismissed for decree-holder's default, or has not been finally disposed of, that is, for instance, is merely 'struck off', or 'recorded', the application continues to exist and with it the attachment, how long so ever it may be confined to the records of the Court without any action, until the decree becomes extinct by the lapse of time under Section 48, C.P. Code.¹ In these cases, the proceedings can be continued without a fresh attachment. If at the date of the alienation the attachment ceased to be operative by any cause such as by payment of the money into Court or by the dismissal of the application for execution for default of the decree-holder (under O. 21, r. 57) any alienation, though made after that attachment, is good.² Accordingly, where subsequent to an attachment the attached property is alienated, but the decree is satisfied by payment, the attachment will cease to exist³ and the alienation will be good, because there is no claim enforceable under the

1. See page 194 *supra*.

2. *Kunki Moossa v. Makki*, (1899) 23 Mad. 478; *Vibudhapriya v. Seethaswami*, (1905) 28 Mad. 380; See also *Kishen Lal v. Bharat Singh*, (1900) 23 All. 114 (where decree-holder abandoned the prior attachment and took out a fresh attachment).

3. See C.P.C., O. 21, r. 55.

attachment.¹ It has been said that when the decree-holder makes an application for fresh attachment the presumption is that the earlier attachment has been abandoned² and thereby ceased to exist and it lies on the decree-holder to show that the earlier attachment subsists and the later one was but superfluous.³

In many cases the attachment may be dormant and may revive to action. Any alienation of the attached property during the period when the attachment has been dormant is also invalid as against all claims that may be enforceable under that attachment. When therefore a claimant of attached property objects to the attachment and his objection is allowed under Order 21 rule 60, and when in a suit under Order 21 rule 63, the decree-holder obtains a declaration that the property is liable for his attachment, any alienation made by the claimant after the order on his claim and before the declaration in the decree-holder's suit, is void against that attachment.⁴ Similarly when the claimant succeeded in his suit in the first Court and the

Attachment
may be
dormant.

1. *Abdul Rashid v. Goppo Lal*, (1898) 20 All. 421; *Anund Lal v. Jullodhar*, (1872) 14 M.L.A. 543; *Umesh Chunder v. Raj Bullub*, (1882) 8 Cal. 279. It seems however that in cases where a claim by the purchaser has been disallowed the decree must have been satisfied or attachment raised before the lapse of a year from the date of the order against the claim, to keep the alienation valid. See *Koyyanna Chittemma v. Doosy Gavaramma*, (1906) 29 Mad. 225.

2. See page 198 supra. *Puddomonee Dossee v. Roy Muthooranath*, (1874) 12 B.L.R. 411; *Chamiappa v. Rama Ayyar*, (1920) 44 Mad. 232 (238) F. B.

3. *Hafiz Suleman v. Sheikh Abdullah*, (1894) 16 All. 133. See also *Kishen Lal v. Charat Singh*, (1901) 23 All. 114.

4. *Ali Ahmad Khan v. Bansidar*, (1909) 31 All. 367; *Bonomali v. Prosunno*, (1896) 23 Cal. 829; *Ram Chandra v. Mudheshar*, (1906) 33 Cal. 1158; *Krishnappa Chetty v. Abdul Khader*, (1913) 38 Mad. 535; *Pratab Chandra v. Sarat Chandra*, (1921) 33 O.L.J. 201=62 I.C. 348.

attachment was consequently raised, the attachment revives when the decree is reversed on appeal and the claim is in consequence rejected.¹ This rule applies to attachments of all properties, moveable or immoveable and if for instance the property attached is a debt, a payment of it in the interval will not affect the attaching creditor.²

Similarly when an attachment has been made and on the objection of the judgment-debtor or his representative the Court disallowed the attachment on any ground, such as that the decree was incapable of execution, or when the Court cancels the attachment under a misunderstanding and restores it subsequently, or when the application for execution dismissed on any ground is restored to file, the attachment continues dormant in the course of the appeal against this order and revives on the reversal of that order and any alienation made after the date of the first Court's order is void against that attachment.³

Attachment must have been effected.

For the purpose of this section, the attachment must have been made in the manner and form prescribed by the Code. The mere passing of an order of attachment or the mere issue of the order from the office is not sufficient to *make* the attachment but the process must be followed by actual attachment and the person prohibited cannot be deemed to know that he is so prohibited, until the prohibition is served on him or is made known in the

1. *Bhuria v. Baliram*, (1922) Nag. 138=65 I.C. 220.

2. *Anthaya Hegade v. Maniayya Setty*, (1921) 45 Mad. 34.

3. *Bank of Upper India v. Sheo Prasad*, (1897) 19 All. 482; *Imtiaz Ali v. Bishambar Das*, (1911) 8 A.L.J. 619; *Durgadas v. Umatal Hosain*, (1908) 9 C.L.J. 239=4 I.C. 46; *Gopal Prasad v. Kashinath*, (1920) 42 All. 39; *Budhu v. Barkat Ram*, (1920) 2 Lah. L.J. 99.

manner recognised by law, namely by proclamation and the like. Until therefore the attachment is actually effected, the judgment-debtor is free to alienate his property and such alienation will be valid.¹ It follows therefore that in judging whether an alienation made by a judgment-debtor can be avoided, the date that must be looked to as starting the period of possible avoidance is not the date of the order of attachment, but that of actual attachment, that is, the actual attachment cannot have retrospective effect from the date of the order. Under S. 276 of the C.P. Code of 1882, the expression used was “where an attachment has been made by *actual seizure or by written order duly intimated and made known in manner aforesaid*” and these italicised words have been omitted in this section (64) of the Code of 1908. This omission did not make any change in the law and because the mode of attachment is laid down in the Code, these words in the Code of 1882 were only superfluous.²

It is not sufficient that the attachment was made, but it must have been effective, that is, must have conformed to the forms of the law. When the copy of the notice was not affixed in the court-house or sent to or posted in the

Attachment must have been effective.

1. See C.P.C., O. 21, rr. 43-48, 51-53; *Rameswar v. Ramtanu*, (1869) 4 B.L.R. 24; *Sahoo Chund v. Geetum Singh*, (1867) 2 N.W.P. 206; *Satya Charan v. Madhub Chunder*, (1908) 9 C.W.N. 693; *Ramanayakudu v. Boya Pedda Basappa*, (1919) 42 Mad. 565; *Sinnappan v. Arunachalam*, (1919) 43 Mad. 844; *Totomal v. Raising*, (1907) 1 S.L.R. 176; *Jowahir Lal v. Jalal Din*, (1905) P.L.R. 137; *Ganga Din v. Khushali*, (1885) 7 All. 702; *Bhagwan Das v. Ahmad Jan*, (1916) 3 O.L.J. 422=36 I.C. 732.

2. *Simrik Lal v. Radharaman*, (1917) 39 I.C. 857, on appeal from (1916) 32 I.C. 276; *Sinnappan v. Arunachalam*, (1919) 42 Mad. 844 F.B. See *Venkatachalapati Rao v. Kameswaramma*, (1917) 41 Mad. 151 F.B. (regarding the operation of stay) and Vol. I. page 846.

office of the Collector under Order 21, rules 46 and 54,¹ when the prohibitory order was not issued and published,² or when the property was wrongly described in the application and the order of attachment,³ when a promissory note was attached not by seizure but by a prohibitory order,⁴ the attachments were held invalid and any alienation subsequent to them could not be avoided.⁵ The same rule applies to attachments before judgment.⁶

Attachment must not be *ultra vires*.

So when the order of a Revenue Court, directing attachment of property in execution of its own decree was *ultra vires*, alienation made subsequent to the attachment was held to be unaffected by that attachment.⁷

Claims enforceable under the attachment.

To section 64, C. P. Code, 1908, an explanation is added: "For the purpose of this section, claims enforceable under the attachment include claims for the rateable distribution of assets." This explanation gives priority to claims for rateable distribution only in connection with the attachment under which they are enforceable. If the attachment is withdrawn or ceases to exist for any reason such as abandonment or default or satisfaction and does not fructify into a sale in Court and realisation of assets, there is no claim to rateable distribution and as against those claims any alienation made after that attachment is good.

1. *Arunachellam Chetty v. Somasundaram Chetty*, (1911) 4 Bur. L. T. 148=12 I. C. 869. But this objection that the formalities were not observed was not allowed to be pleaded for the first time before the Privy Council: *Satya Charan v. Madhub Chunder*, (1908) 9 C.W.N. 693; *Nur Ahmad v. Altaf Ali*, (1878) 2 All. 58.

2. *Dwarkanath v. Ram Chunder*, (1870) 11 W.R. 136.

3. *Gumani v. Hardwar*, (1881) 3 All. 698.

4. *Subramania v. Chokkalinga*, (1923) 46 Mad. 415.

5. *Ramkrishna v. Surfunnissa*, (1880) 6 Cal. 129 P.C.

6. *Bansilal v. Sitaram*, (1922) Nag. 238=68 I.C. 188.

7. *Baldeo Das v. Meshriban Ali*, (1881) A. W. N. 117. See *Surendranath v. Bangsi Badan*, (1916) 22 C.W.N. 150=85 I.C. 457.

This was directedly decided by the Full Bench of Madras in *Annamalai Chettiar v. Palamalai Pillai*,¹ and has been accepted in all Courts in India.

Annamalai Chettiar v. Palamalai Pillai.

Kumaraswami Sastri J. discussed the question in an elaborate judgment which brings together the history of the law :

“ The question referred to us for decision is : ”
 ‘ Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of such attachment ’ and the answer turns on the scope and effect of the explanation added to section 64 of the Civil Procedure Code of 1908 which runs as follows : “ For the purpose of this section claims enforceable under an attachment include claims for the rateable distribution of assets.” The section otherwise reproduces section 276 of the Code of Civil Procedure of 1882, which rendered private alienations of property after attachment void against all claims enforceable under it. Under the Civil Procedure Code of 1859, section 240, which is practically the same as section 276 of the Acts of 1877 and 1882 rendered private alienation subsequent to the attachment void. This section was construed by their Lordships of the Privy Council

1. (1918) 41 Mad. 265 F.B. *Rangi Ram v. Gangu*, (1919) P.R. 5=49 I.C. 134; *Khushalchand v. Nandram*, (1911) 35 Bom. 516; *Jetha Bhima & Co. v. Lady Janbai*, (1912) 14 Bom. L.R. 511=15 I.C. 950; *Bohra Bhupal v. Kundal Lal*, (1921) 43 All. 221; *Sheik Mahomed v. Bhagwati Prasad*, (1922) 66 I.C. 642. See also *Goteti Vigneswarudu v. Venkata Suryanarayana murthi*, (1917) 7 L.W. 578=45 I.C. 782.

*Annamalai
Chettiyar v.
Palamalai
Pillai.*

in *Anund Loll Doss v. Jullodhur Shaw*¹ to mean that the private alienation was only void in so far as it was necessary to secure the execution of the decree to the creditor who obtained the attachment and that the protection cannot be extended to all persons who at any future time might possibly obtain execution of their decrees. Section 276 of the Act X of 1877 which introduced the words "as against all claims enforceable under the attachment" was, in recognition of the limitation imposed by Courts in India and the Privy Council on the general language used in section 240 of the Act of 1859. Sections 270 and 271 of the Act of 1859 gave priority to the first attaching creditor and provided for rateable distribution between other decree-holders who had taken out execution and not obtained satisfaction in so far as any surplus remained out of the sale-proceeds. The Acts of 1877 and 1882 took away the priority of the first attaching creditor and in place of sections 270 and 271 of the old Code enacted section 295 which provided for rateable distribution between all decree-holders who prior to the realisation of assets had applied to the Court for execution and had not obtained satisfaction.

" Though the position of decree-holders who were entitled to rateable distribution in case the attachment culminated in a sale was fairly clear, questions arose as to what was to happen if there was a private alienation during the existence of an attachment which was put an end to either by satisfaction of the decree or was raised owing to other reasons. In *Ganga Din v. Khushali*² the

1. (1872) 14 M.I.A., 548.

2. (1885) 7 All. 702.

judgment-debtor sold attached property and paid off the decree-holder who attached it. Decree-holders who would have been entitled to rateable distribution if the attachment had not been put an end to objected to the removal of the attachment but their objection was overruled on the ground that their claims were not protected by section 276 they having no right to anything till there was an actual sale and realization of assets, and applications for execution, though entitling the decree-holder to rateable distribution under section 295, were not equivalent to an attachment under section 276. The same view was taken in *Manohar Das v. Ram Autar Pande*.¹ In *Umesh Chunder Roy v. Raj Bullabh Sen*,² where an alienation was made pending an attachment, it was held that the attachment ceased on the decree being paid off and that the assignment was good against a subsequent attachment by the same party in execution of another decree.

*Annamalai
Chettiyar v.
Palamalai
Pillai*

“ In *Durga Churn Rai Chowdhry v. Monmohini Das*,³ it was held following *Ganga Din v. Khushali*,⁴ that a claim under section 295 is not enforceable as an attachment against which an agreement is rendered void by the provisions of section 276. Piggott and Rampini, JJ., after pointing out that the legislature had not provided that a petition under section 295 shall have the same effect as an attachment observed as follows :—“ To hold that claims under section 295 are claims enforceable by attachment against which assignments made under section 276 are void, would perhaps be carrying out the

1. (1903) 25 All. 431.

2. (1882) 8 Cal. 279 (281).

3. (1888) 15 Cal. 771.

4. (1885) 7 All. 702.

*Annamalai
Chettiyar v.
Palamalai
Pillai.*

intention of the legislature when section 295 was introduced. Unfortunately, the sections of the Code relating to execution were not recast so as to be fully adapted to the new state of things. Section 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under section 295.

“In *Kunhi Moossa v. Makki*,¹ a kanom was executed pending an attachment and the decree in execution of which the property demised under the kanom was attached was paid off. It was held that the kanom was valid as against decree-holders who had applied for execution and who would in the ordinary course have been entitled to rateable distribution if the property had been sold. Subrahmanya Ayyar, J., was of opinion that the attachment ceased to be operative in so far as the attaching creditor was concerned on the decree amount due to him being paid off, and that “on principle it follows that with reference to the other judgment-creditors, also, who, had the attachment resulted in the realization of assets, would have been entitled to a rateable distribution, the attachment became inoperative.

“In *Vibudhapriya Tirthaswami v. Yusuf Sahib*,² a similar view was taken. It was held by Sir Arnold White, C. J., and Davies, J., that the rights of decree-holders who had applied for execution of their decrees depended upon section 295 and that unless the events upon the happening of which section 295 would have come into operation, namely, the realization of assets by the Court, happened, they had no claims enforceable under the attachment

1. (1900) 23 Mad. 478.

2. (1905) 28 Mad., 380.

so as to attract the provisions of section 276 to the alienations questioned. The further question as to whether the words "claims enforceable under the attachment" would include claims of judgment-creditors other than the attaching creditor as was held in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*¹ or only the claims of the attaching creditor as was held in *Manohar Das v. Ram Autar Pande*² was left undecided.

Annamalai Chettiyar v. Palamalai Pillai.

"The decisions in Bombay have placed a more liberal interpretation on section 276. In *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*¹ a more liberal interpretation was placed on the words "claims enforceable under the attachment" than was placed by the Allahabad and Calcutta High Courts. It was held that when a sum of money due to the judgment-debtor was attached and he assigned his rights after attachment and other decree-holders subsequently attached the same sum they were entitled to rateable distribution of the sum paid into Court by the garnishee as against the transferee from the judgment-creditor prior to their attachment on the ground that their claims were claims enforceable under the attachment. Mr. Justice Telang in an elaborate judgment after a review of all the authorities on the point held that while realization of assets under section 295 would protect decree-holders who had applied for execution even subsequent to the alienation their rights were dependent on realization and consequently would not prevail over the purchaser after attachment if the attachment ceased to have effect owing to the satisfaction of the decree or other causes—the purchaser being perfectly safe in the latter case.

1. (1892) 16 Bom., 91.

2. (1903) 25 All., 431.

*Annamalai
Chettiar v.
Palamalai
Pillai.*

“ It was in this state of the authorities that the legislature enacted section 64 of the present Code (Act V of 1908). An explanation was added to section 64 to the effect that for the purposes of that section, claims enforceable under the attachment included claims for rateable distribution. As pointed out in *Jetha Bhima & Co. v. Lady Janabai*,¹ the explanation is to give legislative approval to the extended meaning given to the words “ claims enforceable under the attachment ” in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*.² In this view a reference to the authorities as they stood prior to the passing of the new Act would be relevant. It will be useful to consider in this connection the other relevant provisions of the Code. In section 73 which corresponds to section 295 of the Act of 1882 the words used are “ where assets are held by a Court and more persons than one have, before the receipt of such assets, made application ” instead of “ whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court ” in section 295 of the old Code. In Order XXI, rule 55, which corresponds to section 275, a clause is added providing that the attachment shall be deemed to be withdrawn and for notification of such withdrawal by proclamation at the place where the property is situate.—The only amount to be paid in order to get the attachment withdrawn is the amount decreed with costs and all charges and expenses resulting from the attachment and clauses (b) and (c) only refer to satisfaction and reversal of the decree in execution of which the property is attached.

1. (1913) 37 Bom., 138.

2. (1892) 16 Bom., 91.

Order XXI, rule 57, which is new, provides for the determination of the attachment if the execution application is dismissed owing to the decree-holder's default. Order XXI, rule 69, which corresponds to section 291 of the Act of 1882, provides that the sale shall be stopped if before the lot is knocked down the debt and costs including the costs of sale are tendered to the officer conducting the sale, or proof is given that the amount has been paid into Court. Order XXI, rule 89, corresponding to section 310A, requires that only the amount specified in the proclamation of sale less any payment subsequently made should be paid into Court with 5 per cent. of the purchase money.—Form 8 of Appendix E to the Code specifies the sum due and—authorizes attachment and directs the officer to hold the same until further order of the Court unless the amount specified is paid and similarly the prohibitory order specifies the amount for which the decree has been passed. Form 24 which relates to attachment of immoveable property under Order XXI rule 54,—also gives the amount of the decree in execution of which the attachment is made. It is clear from the rules and forms above referred to that the attachment ceases to have any force as soon as the decree in execution of which the property has been attached is satisfied or the execution application is dismissed owing to the decree-holder's default. It is significant that the last clause of Order XXI, rule 55 and the whole of rule 57 are new and that no reference is made to the claims of persons who would be entitled to rateable distribution. In contrast with this, Order XXI, rule 90, which relates to the setting aside of sales for irregularity and which corresponds to section 311 of the old Code contains the words "entitled to share

*Annamalai
Chettiyar v.
Palamalai
Pillai.*

*Annamalai
Chettiar v.
Palamalai
Pillai.*

in a rateable distribution of assets" not found in section 311. Reference was made in the course of argument to *Lakshmi v. Kuttunni*,¹ *Athappa Chetti v. Ramakrishna Nayakan*,² *Chakrapani Chettiar v. Dhanji Settu*,³ and *Ayodhya v. Nand Lal*,⁴ which decided that the term "decree-holder" included a person entitled to rateable distribution for the purpose of section 311 and rule 90 has incorporated the result of the decisions. If the legislature intended the attachment to enure for the benefit of all persons entitled to rateable distribution, it would similarly have declared that the attachment should cease only on all their claims being satisfied or that the cesser of the attachment should be without prejudice to their rights. That the difficulty created by rules 55 and 57 of Order XXI is real will be clear from the fact that the existence of a valid attachment is necessary in order to bring the property to sale and if the attachment ceases, when the decree-holder who attaches is paid off, a re-attachment will be necessary which will be of no avail if it is subsequent to the alienation, see *Gobind Singh v. Zalim Singh*,⁵ and *Mina Kumari Bibi v. Bijoy Singh Dudhuria*.⁶ In order to get over this difficulty we shall have to read into all the rules in Order XXI relating to the raising of the attachment and in rule 89 the words "the amount due to decree-holders who would be entitled to rateable distribution prior to the private alienation." It is difficult to see under what rules of construction such a wholesale addition to the rules can be made.

1. (1887) 10 Mad. 57.

2. (1898) 21 Mad. 51.

3. (1901) 24 Mad. 311.

4. (1893) 15 All. 318.

5. (1884) 6 All. 33.

6. (1917) 44 Cal. 662 (P.C.)

“It is contended for the appellant with some force that section 64 enacts that the alienation pending attachment shall be void as against all claims for rateable distribution of assets, that claims for rateable distribution are not dependent on the attachment but on section 73, that the claim for rateable distribution would have been enforceable if the properties had been allowed to be sold, that the legislature in enacting the explanation to section 64 intended to make an attachment by one decree-holder to enure for the benefit of all persons entitled to rateable distribution (the policy of the law being to prevent multiplicity of attachments), that the decree-holder who actually attaches and who under the law would have no priority in case the assets were realized by sale ought not to be allowed to defeat the rights of the other decree-holders, and that by sanctioning the alienations of property behind their back and paying off the attaching creditor he will virtually get priority. It is also contended that though under rules 55 and 57 the attachment ceases on payment of the decree-debt of the attaching creditor yet a fresh attachment by those entitled to rateable distribution should be treated as a continuation of the original attachment and that in any event section 64 should be read as making the alienation void as against subsequent attachment by those who would, if the execution have been allowed to proceed, have been entitled to rateable distribution.

*Annamalai
Chettiar v.
Palamalai
Pillai.*

“It has been argued for the respondent that the explanation added to section 64 only protects “claims for rateable distribution,” that such claims can only arise when assets are held by a Court under section 73, that the explanation was merely the legis-

*Annamalai
Chettiyar v.
Palamalai
Pillai.*

lative recognition of the principle enunciated by the Bombay High Court in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*,¹ and that the decision of their Lordships of the Privy Council in *Mina Kumari Bibi v. Bijoy Singh Dudhuria*,² is conclusive on the matter.

“ There can be little doubt that section 64 as it stands at present can protect decree-holders entitled to rateable distribution against private alienation, only where assets have been realized in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a very limited class of cases, e.g., where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immoveable property the amendment would be of no use to decree-holders to rateable distribution. Assuming that the legislature intended the attachment under section 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation, it has not gone far enough when it introduced the explanation to section 64 worded as it is and made no provision for the continuance of the attachment in Order XXI in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the legislature.”

To this rule of avoidability of an alienation pending attachment the C.P. Code enacts an exception :

“ (1) Where an order for the sale of immoveable property has been made, if the judgment-

1. (1892) 16 Bom., 91.

2. (1917) 44 Cal., 662 P.C.

Leave for
private sale
pending
attachment.

debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all moneys payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property."¹

This rule does not apply to suits for rent in Bengal.² It does not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage on such property, the reason being that in the case of a mortgage decree the right of sale does not depend on attachment in exe-

1. C.P.C. O. 21, r. 83.

2. Bengal Tenancy Act, (VIII of 1865), S. 148.

cution, but is conferred by the decree itself.¹ An application for extending the time for redemption to enable the mortgagor to raise the amount by mortgage or private sale is expressly prohibited by the Code, and no appeal lies from an order of Court refusing to do it.²

The object of this rule is to prevent the sale of property attached in execution of a decree if the whole decree can be satisfied by private alienation within a reasonable time without detriment to the decree-holder's rights under the attachment. Therefore a mortgage of attached property for a sum less than the decree amount, though it may be bona fide and binding on the mortgagor and mortgagee cannot be valid against the decree-holder or prevail over his attachment.³

If the judgment-debtor satisfies the Court that there is a fairly easy way of raising money by private alienation⁴ without prejudice or undue delay⁵ to the creditor, the Court will grant the permission,⁶ but the Court has a discretion.⁷ A period of six months was considered reasonable,⁸ but not

1. *Karu Lal v. Punjab National Bank, Ltd.*, (1920) P.L.R. = 55 I.C. 816. Under the old Code the provision applied to mortgage decrees also; *Krishnaji v. Mahadev*, (1900) 25 Bom. 104; but contra in Calcutta and Madras, *Womda Khanum v. Rajroop*, (1877) 3 Cal. 335; *Narasimhacharlu v. Pedda Ramayya*, (1896) 6 M.L.J. 187.

2. *Kavribai v. Mehta & Sons*, (1923) 46 M.L.J. 71=75 I.C. 901.

3. *Gurusami v. Venkatasami*, (1890) 14 Mad. 277.

4. Mere representation at the time of the sale that the judgment-debtor can obtain a higher price is not ground for putting off the sale, *Luchmee Narain v. Bhyroo*, (1866) 1 N.W.P. Mis. 11.

5. *Mohinee Mohun v. Ram Kant*, (1871) 15 W.R. 322; *Ram Ruttun v. Land Mortgage Bank*, (1872) 17 W.R. 193; *Rednum v. Khaja*, (1870) 5 M.H.C.R. 272.

6. *Kishan Coomaree v. Golab Comaree*, (1871) 15 W.R. 477.

7. *Bishenmull v. Land Mortgage Bank*, (1884) 11 Cal. 244 P.C.

8. *Mohinee Mohun v. Ram Kant*, supra.

one year, two or three years or twenty years.¹ But it is always a question of fact to be determined on the needs and circumstances of each case.

The application must be granted before the sale and after the order for sale. Where, after auction-sale of immovable property in execution of a money decree, the judgment-debtor applies for time under this rule to enable him to raise the amount of the decree by mortgage of the property sold by auction, the executing Court has no power to grant the application under that section. The executing Court is bound, under the imperative provisions of Order 21 rule 92 to pass an order confirming the sale, if the sale is not set aside before the expiry of the period of limitation prescribed for applications under Order 21, rules 89 and 90.²

Application
for leave.

The Court must authorise the judgment-debtor to make the alienation and grant him a certificate of authority. The Court cannot itself make the alienation.³ In authorising a sale under this rule, a Court cannot empower a judgment-debtor to transfer any higher interest than he has and bind the interest of his co-judgment-debtor or others in the property.⁴

Certificate of
authority.

When the judgment-debtor is a minor for whom a guardian had been appointed under the Guardian and Wards Act, 1890, it is the Court that appointed

1. *Ram Ruttun v. Land Mortgage Bank*, supra; *Suhuj Narain v. Ram Pershad*, (1874) 21 W.R. 146; *Fyaz-ood-deen v. Girandh Singh*, (1870) 2 N.W.P. 1.

2. *Girdhari Lal v. Bhago*, (1907) P.R. 92; also *Ghania Lal v. Pohlo Mal*, (1910) P.R. 72=7 I.C. 718.

3. *Luchmeeput v. Jugul Indur*, (1864) W.R. Mis. 5.

4. *Danappa v. Yamnappa*, (1902) 26 Bom. 379; *Ramayya v. Krishnachariar*, (1919) 26 M.L.T. 151=52 I.C. 956; *Dwijendra Mohan v. Manorama Dasi*, (1922) 49 Cal. 911.

the guardian that must sanction the alienation. That will be in addition to the authority to alienate granted under this rule of the Code. In such a case therefore, two courts must sanction the alienation.¹

Payment of price.

The mortgagee, lessee or purchaser as the case may be must pay all the money payable by him into Court and not to the judgment-debtor, except when he happens to be the decree-holder himself, and he is entitled to set off under Order 21 rule 72. Under rule 72, the right to set off is subject to the rights of other judgment-creditors for rateable distribution, so that moneys realised by private alienation under the authority granted by the Court are assets liable for rateable distribution under section 73.² Payment to the judgment-creditor's pleader under order of the Court is tantamount to payment into Court.³

Confirmation of sale.

No alienation made under this rule is valid unless confirmed by the Court. A private sale by a judgment-debtor, which had not been confirmed by the Court, did not convey to the vendor such title in the property as to entitle him to maintain a suit for possession of property against another similar vendee.⁴

In *Andanapa v. Bhimarao Annaji*⁵ one P obtained a decree against V in the Court of the Second Class Subordinate Judge at Court S. He applied (darkhast of 1892) for execution, but V, on 19th April, 1893, obtained permission of Court and

1. *Dattaram v. Gangaram*, (1898) 23 Bom. 287; *Sarju v. District Judge of Benares*, (1909) 31 All. 378.

2. *Thiraviyam Pillai v. Lakshmana Pillai*, (1918) 41 Mad. 616. See Chapter of TERMINATION OF EXECUTION POST.

3. *Miajan Ali v. Rupchandrar*, (1913) 21 I.C. 210.

4. *Sri Lal v. Ballabh Shankar*, (1882) A.W.N. 243.

5. (1894) 19 Bom. 539.

a certificate, to raise the amount of the decree by sale on or before the 6th June 1893, the day fixed for the sale. Another decree was obtained against V in the Court of the First Class Subordinate Judge at Court B by one A, and he attached in execution the same lands, which were already attached by the Court S. From the Court B however, V also obtained a certificate on 22nd April, 1893, authorizing a private sale. Relying on these two certificates V sold the lands under attachment to the applicant Andanapa for Rs. 2,000 by deed dated 25th May, 1893. On 28th June, 1893, Andanapa applied to the First Class Subordinate Judge in Court B, for confirmation of the sale and that the purchase money paid by him should be distributed as follows, viz., Rs. 518-14-2 in satisfaction of the decree of the Court B, Rs. 128-7-10 in satisfaction of the decree of the Court S, and the balance Rs. 1,352-10-0, to be paid to V. The Court B granted the application and directed that the above sum of Rs. 128-7-10 should be paid into the Court S. On the 17th July, 1893, Andanapa applied to the Court S to confirm the sale already confirmed by the Court B and he brought into Court the said sum of Rs. 128-7-10. On the 19th June, 1893, while the above proceedings were going on, a third decree-holder (the opponent) had applied to the Second Class Subordinate Judge at S for execution of his decree. He objected to the confirmation of the sale applied for by the applicant. The Subordinate Judge allowed the objection and refused confirmation of the sale. The applicant then applied to the High Court under its extraordinary jurisdiction. It was held that the application to the Court S by Andanapa was superfluous and ought to have been rejected in

as much as the sale had already been confirmed by a competent Court (viz., the Court B) and nothing further remained to be done in regard to it.

It is not necessary to make a formal application for confirmation. When the Court directs a private purchaser under this rule to pay the price to the decree-holder and makes no objection to the sale, it, in effect, confirms the sale.¹ It is doubtful whether a sale under this rule comes within the purview of Order 21 rule 92, but there is no legal bar to the confirmation of the sale before the expiry of thirty days from the date of the sale.² In *Miajan Ali v. Rup Chandra Sarma*,³ on January 15, 1911, a Court gave a certificate to a judgment-debtor under this rule 83, for private sale of his property. On January 24, 1911, the property was attached in execution of another decree. On January 31, 1911, the judgment-debtor, the first decree-holder and the proposed purchaser appeared before the Court and informed it that the private sale had been effected, whereupon the Court ordered the proposed purchaser to deliver the money to the decree-holder, which was done. The purchaser made an application for the withdrawal of the attachment of January 24, 1911. It was held that the purchaser had acquired an absolute title and the attachment could not proceed.

Annulment of confirmation.

A purchase sanctioned and confirmed by the Court under this rule will not be set aside on light grounds, but if the approval of the Court has been obtained by misrepresentation or by the withholding of material information the Court will treat such

1. *Miajan Ali v. Rup Chandra*, (1913) 21 I.C. 210.

2. *Ibid.*

3. *Ibid.*

misrepresentation as fraud and will act accordingly. In *Atmaram v. Balakrishna*,¹ B (defendant) obtained two decrees against R, one for Rs. 150 and the other for Rs. 750, the latter amount being payable by yearly instalments of Rs. 250 each. About the same time, K obtained a decree against R for Rs. 47. B presented a *darkhast* for the recovery of Rs. 182-7-9 under his first decree; and K also about that time presented his *darkhast* to execute his decree. B then presented another *darkhast* in respect of money due under his second decree, in which he prayed for rateable distribution under section 294 of the Civil Procedure Code (Act XIV of 1882). In his first *darkhast* B prayed for attachment and sale of the property belonging to R, and the property was accordingly placed under attachment. Subsequently R made an application to the Court to allow him one month's time to raise money in order to satisfy K's decree and also the first decree of the defendant. The Court granted him one month's time and issued to him a certificate, as required by section 304 of the Civil Procedure Code, 1882, which expressly directed that the amount realized by sale or mortgage of the property should be paid into Court and not to the judgment-debtor. The property in dispute was sold by R to the plaintiff privately; and the plaintiff made two applications to the Court in which he stated that he had produced before the Nazir an amount of purchase money sufficient to satisfy K's decree and the first decree of B, and prayed that the property might be released from attachment. The Court granted the applications; but B on the same day applied to the Court asking the Court not to confirm the sale and

1. (1905) 29 Bom. 615.

withdraw the attachment as the sale to the plaintiff was made to defeat his later decree. The Court held the sale to be fictitious and fraudulent. B then got the property attached and sold in execution of his later decree and purchased it himself with the permission of the Court. The plaintiff, shortly after this, filed a suit against B to recover possession of the property. It was held that under the circumstances it was clear that a fraud was practised upon the Court, and that therefore the purchase by the plaintiff was vitiated by the fraud.

A sale of property in virtue of a certificate under this rule is a private sale only and though it does not become absolute until confirmed by the Court it cannot be said to be a sale by Court in execution of the decree and thus not liable to preemption.¹

Attachment
before judg-
ment.

“(1). Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—
(a) is about to dispose of the whole or any part of his property or, (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached

1. *Ahmad Jan v. Kishen Chand*, (1918) 52 I.O. 337.

and the estimated value thereof. (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."¹

"(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached. (2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit."² "Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree."³ "Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner herein-before provided for the investigation of claims to property attached in execution of a decree for the payment of money."⁴ "Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed."⁵ "Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person

1. C.P.C., O. 38, r. 5.

2. *Ibid.*, r. 6.

3. *Ibid.*, r. 7.

4. *Ibid.*, r. 8.

5. *Ibid.*, r. 9.

holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.”¹ “Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.”² “Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.”³

When a suit is dismissed, an attachment before judgment terminates without an order of the Court,⁴ and if the judgment is reversed on appeal or annulled on review, the attachment does not revive so as to affect alienations made before the date of such reversal or annulment.⁵

Where in execution of a decree in a suit in which an attachment before judgment had been obtained, the application for execution is dismissed on account of the decree-holder's default in taking steps to enable the Court to proceed further with the execution, according to the Full Bench of the

1. *Ibid.*, r. 10.

2. *Ibid.*, r. 11.

3. *Ibid.*, r. 12.

4. *Ram Chand v. Pittam Mal*, (1888) 10 All. 506; *Abdul Rahman v. Amin Sharif*, (1918) 45 Cal. 780; *Sasirama Kumari v. Meherban*, (1911) 13 C.L.J. 243=9 I.C. 918. See also *Meyyappa Chettiar v. Chidambaram Chettiar*, (1923) 47 Mad. 483 F.B.

5. *Sasirama Kumari v. Meherban*, (1911) 13 C.L.J. 243=9 I.C. 918; *Abdul Rahman v. Amin Sharif*, (1918) 45 Cal. 780 (In such case a sale without fresh attachment is not good. So a surety's liability does not revive on the claim being upheld on appeal; *Shanker v. Ram Kishen*, (1915) P.W.R. 53=29 I.C. 271; *Nathumal v. Kishori Lal*, (1915) 23 I.C. 1071.

Madras High Court the attachment before judgment ceases to exist. It was said that 'property attached in execution' in Order 21 rule 57 includes property attached before judgment, when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale and that when the petition for execution is admitted, the attachment before judgment becomes an attachment in execution.¹ A contrary view has been taken in Calcutta and Allahabad.²

Meyyappa Chettiar v. Chidambaram Chettiar.

In *Vishnu v. Rampratap*,³ Vishnu filed a suit for money, and under an attachment before judgment, perishable property was sold and the proceeds were deposited in Court. A decree was passed on 10th April 1916. Another person who had previously obtained a decree against the same defendant applied for attachment of these moneys on 7th April under Order 38 rule 10 and money was paid out to him on 19th April. Vishnu had meanwhile not applied for the execution of his decree as he had not got a copy of the decree. In a suit by him to recover a rateable share of the amount, which he would have got if he was entitled to rateable distribution, it was held he could not recover and Macleod

Vishnu v. Rampratap.

1. *Meyyappa Chettiar v. Chidambaram Chettiar*, (1923) 47 Mad. 483 F.B. where the judgment of Ramesam J. reviews all the case law (Schwabe C.J. and Wallace J. dissenting) [overruling *Venkata Subbiah v. Venkata Seshaiya*, (1919) 42 Mad. 1; and dicta to the contrary in *Banuddin v. Arunachala Mudali*, (1914) 26 M.L.J. 215 = 22 I.C. 351 and *Surapuraju v. Narasimham*, (1914) 1 L.W. 932 = 26 I.C. 81]; *Arunachalam Chetty v. Periasami Servai*, (1921) 44 Mad. 902 F.B.; *Pallonji v. Edward Vaughan*, (1888) 12 Bom. 400; *Ganpati v. Mukunda*, (1921) 17 N.L.R. 121 = 63 I.C. 712; *Amolak v. Mahipat*, (1922) 66 I.C. 856; see also *Durpati Bibi v. Ramrach Pal*, (1909) 31 All. 527.

2. *Ganes Chandra v. Banwari Lal*, (1912) 16 C.L.J. 86 = 14 I.C. 345 dissenting from *Sewdat Roy v. Sree Canto Maity*, (1906) 33 Cal. 639; *Bharcy Akhey Ram v. Basant Lal*, (1924) 80 I.C. 106. See also *Bhugwan Chunder v. Chandra Mala*, (1902) 39 Cal. 773.

3. (1920) 45 Bom. 360.

C.J. said, " But although it may be said that the attaching Court, before it paid out the proceeds of the petitioner's attachment to the opponent, ought to have given the petitioner notice as a matter of equity, still I cannot see anything in the Code which makes it necessary for the attaching Court to give such notice. Until the petitioner applied for attachment, no doubt the money was lying in Court, detained for his benefit, but still available for any decree-holder of the same defendant. If a decree-holder applied for attachment of those moneys which were being detained, the Court was bound to grant such an application. If the Court had given notice to the petitioner, and he had made an application for the execution of his decree, the Court might then have said that he was entitled to rateable distribution. It seems to me that the petitioner, having got his decree, failed to observe that there was a risk of his losing the fruits of his attachment. He did not apply to the Court at once to confirm the previous attachment, in other words, he did not apply for the execution of the decree so as to make his position secure. I cannot say therefore, that there has been any material irregularity in the proceedings of the lower Courts in dismissing the petitioner's suit."

Temporary
injunction.

A temporary injunction restraining the judgment-debtor from alienating property has not the effect of an attachment and the alienation of the property subject to the injunction contrary to its terms is not void or illegal.¹ When therefore subsequent to the temporary injunction, the decree-

1. *Delhi and London Bank Ltd. v. Ram Narain*, (1887) 9 All. 497; *Manohar Das v. Ram Autar Pandc*, (1903) 25 All. 431; In *Agarchand v. Chajjoolal*, (1899) 12 C.P.L.R. 109, it was said the knowledge of the alienee might make the alienation void.

holder purchased the property from the judgment-debtor and gave up the execution proceedings, he could not maintain a suit for possession of the property from an alienee to whom it had been sold in defiance of the injunction.¹

An attachment prior to decree is not an attachment for the enforcement of the decree, but it is a step taken merely for preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed is sought to be executed. An attachment after decree is an attachment made for the immediate purpose of carrying the decree in execution and it presupposes an application on the part of the decree-holder to have his decree executed. Rules relating to attachments do not ensure to the plaintiff payment, in any event, of whatever may be decreed to him, but only so far as that is ensured by preventing the defendant making away with property.²

Attachment before and after judgment.

This provision against alienation applies in the cases of attachments before judgment made under Order 38.³ Such an attachment does not become invalid, though the actual attachment is made after the decree is passed.⁴ But any alienation made between the dates of the order and of the actual attachment would be good.⁵

Provision against alienation affects attachments before judgment.

1. *Baldeo Pershad v. Parichat*, (1900) A.W.N. 148.

2. *Sri Rammarik v. Tincowri Rai*, (1869) 3 B.L.R. 63 F.B.

3. *Suraj Bunsu v. Sheo Pershad*, (1879) 5 Cal. 148 (174).

4. *Venkata Subbiah v. Venkata Seshaiya*, (1919) 42 Mad. 1.

5. See *Sinnappan v. Arunachalam*, (1919) 42 Mad. 844 F.B., where the observations of the learned judges in 42 Mad. 1 *supra* were considered. The judgments of the referring judges Oldfield and Sadasiva Iyer JJ. are important. Sadasiva Iyer J. said with reference to that decision, "But the real basis of that decision seems to me to have been (as stated in the judgment of Philips J.) that it is not necessary at all that there should be an attachment fully effected before

Jurisdiction
in execution
restricted to
territorial
limits.

The jurisdiction of a Court in enforcing execution of its decree is restricted to its territorial limits. It is a general principle that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction. A Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, as when such property is in the hands of, or custody of another, also outside the jurisdiction, can only reach that property by means of the recognised legal procedure, viz., the decree to be executed must be transferred to the Court within whose local limits the property sought to be attached is for the time being situate. Among the exceptions to this rule are sales of immoveable property in execution of decrees on mortgages and attachment of salaries of public servants under Order 21 rule 48. It is not competent therefore for a Court, in execution of a decree for moneys, to attach at the instance of the decree-holder, a debt payable to the judgment-debtor by a person resident outside its jurisdiction. This was the decision in *Beg Dunlop Co., v. Jagannath*.¹

Arrest and
attachment
other than
in execution
of decrees.

“(1) Where an application is made that any person shall be arrested or that any property shall be attached *under any provision of this Code not*

judgment to attract the provisions of O. 38 r. 11 (which dispenses with re-attachment after decree)” and as a consequence the provisions of section 64; but it is only necessary that the property should have become attached and “under attachment” (whether before or after judgment) “by virtue of the provisions of this order.” On these observations, see also *Meyappa Chettiar v. Chidambaram Chettiar*, (1924) 47 Mad. 483 F.B.

1. (1911) 39 Cal. 104 (109); *Prem Chund v. Mokhoda*, (1890) 17 Cal. 699 (703); also Vol. I Chap. III.

relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion issue a warrant of arrest or make an order of attachment, and send to the District Court, within the local limits of whose jurisdiction such person or property resides or is situate, a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court, shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small

Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.¹

Precepts.

“(1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept. (2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree. Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for sale of such property.”²

Attachment before judgment outside jurisdiction.

Under the C P. Code of 1882, (section 483) an attachment before judgment could be granted where a defendant with a wrongful intent “(a) is about to dispose of the whole or any part of his property or to remove the same from the jurisdiction of the Court in which the suit is pending or (b) has quitted the jurisdiction of the Court leaving therein property belonging to him.” On a construction of this section in *Krishnasami v. G.A. Engal*,³ Turner C.J.

1. C.P.C. S. 136 (=Old Code, S. 648).

2. C.P.C. S. 46. See Vol. I. 82.

3. (1884) 8 Mad, 20; *Pannu Thevappa v Satha Chetty*, (1902) 1 L.B.R. 310; *Sivaswami v. Sulaiman*, 3 L.B.R. 255. For a similar view, under the earlier Codes also, see *Haji Jiva v. Abu Bakar*, (1871) 8 B.H.C.R. 29; *Balaram Mulick v. Solano*, (1871) 8 B.L.R. 335; *Kedarnath v. Seeva Veyana*, (1878) 1 C.L.R. 336 and contra in *re Abraham*, (1869) 6 B.H.C.R. 170.

said : " We agree with the learned Judges of the Presidency Small Cause Court that sections 483 and 484 warrant the attachment before judgment only of property within the jurisdiction of the Court. The plaintiff, it is provided, may apply to the Court to direct that any portion of the property of the defendant *within the jurisdiction of the Court* shall be attached. This limitation of the application governs the proceedings which follow it and regulates the power of the Court. The words 'within the jurisdiction of the Court' were introduced into the Code for the first time by the Act of 1879, and appear to embody the result of rulings which had been passed before S. 648 was a part of the Code. Section 648 does not authorize the Court to attach any property which it is not authorized to attach by any other sections of the Code, though it permits it to transmit its order where such an order may be made for execution beyond the local limits of its jurisdiction. The words are 'where any Court desires . . . that any property shall be attached under any provision of this Code.' There are sections of the Code other than sections 483 and 484 which authorize the attachment of property without qualification as to its location and when it has made orders under these sections, the Court can avail itself of the powers given by section 648."

A similar view was taken in Bombay.¹

A contrary view was taken in Calcutta in *Ram Pertab v. Madho Rai*,² and it was said that it was the uniform practice of the Calcutta High Court to attach before judgment property outside jurisdiction.

1. *Gokaldas v. Jankibai*, (1903) 5 Bom. L.R. 570.

2. (1902) 7 C.W.N. 216.

Change in the law.

Under the C.P. Code 1908, the expression has been changed : " Where at any stage of the suit, the Court is satisfied by affidavit or otherwise that the defendant (a) *is about to dispose of the whole or any part of his property or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.*" The limitation inferred by the Madras and Bombay High Courts under the Code of 1882 was based on the use of the words "*within the jurisdiction of the Court*" in clause (a) and on that account it was said that even section 648 of that Code (now section 136) could not get the Court out of that limitation. Now that under the Code of 1908, these words have been omitted from clause (a), it would follow that, independently or by the operation of section 136, the Court has power now to attach before judgment property outside the limits of a Court's local jurisdiction. The view was rightly taken by the Chief Court of Lower Burma. It was held that though the property referred to in clause (b) Order 38, rule 5 must be property within the local limits of the Court's jurisdiction, no such restriction is imposed regarding property mentioned in clause (a), so that this Code permits the attachment before judgment of property situate within or without the local limits of a Court's jurisdiction.¹ But a contrary view has been expressed later on by the Judicial Commissioner of Upper Burma.²

Begg Dunlop & Co. v. Jagannath.

In *Begg Dunlop & Co., v. Jagannath*,³ Mookerjee J. did not there seriously consider the effect of

1. *Somasundaram Chetty v. Muthuveerappa Chetty*, (1911) 4 Bur. L.T. 89=10 I.C. 794.

2. *Bhai Khan v. Des Raj*, (1914) 25 I.C. 771. It was argued in this case that the report of the Select Committee showed an intention to remove the restriction but the Court refused to look at it.

3. (1911) 39 Cal. 104 (118).

the decision in *Ram Partab v. Madho Rai*,¹ though it was there cited, because the question before the Court was the legality of an attachment of a debt payable outside the Court's jurisdiction, but casually remarked that there was weighty authority to the contrary in Madras, Bombay and Burma (referring to the cases cited above) and said, "In the case of an attachment before judgment, the question turns upon the construction of Order 38, rules 5 and 6, read with section 136. Besides in the case of an attachment before judgment, the garnishee cannot be required to pay the debt into Court for the benefit of the plaintiff. Whether, after attachment has been so obtained before judgment, it can subsequently be made available for the benefit of the successful plaintiff is a question by no means free from difficulty and does not require consideration in the present instance." In *Surendranath v. Bansi Badan*² this question came directly for decision and Mookerjee J. himself had to deal with it. The learned judge referred to the case of *Begg Dunlop and Co., v. Jagannath* aforesaid and held that it was not competent to a Court to make an interim order for attachment under clause (3) of rule (5) of Order 38 C. P. Code, of a debt payable to the defendant outside its jurisdiction by a person not resident within its jurisdiction. It was also said that "when a Court has manifestly usurped jurisdiction and has illegally secured possession of a fund, which should not have come under its control, its orders must be discharged; it would be lamentable to allow such illegal orders to stand, on the plea that possibly similar orders could have been made by a Court of

*Surendra-
nath v.
Bansi Badan.*

1. (1902) 7 C.W.N. 216.

2. (1916) 36 I.C. 457.

*Surendra-
nath v.
Bansi Badan.*

competent jurisdiction.” Where on the assumption of such jurisdiction, moneys had been paid out to the decree-holders, the learned judge directed that the decree-holders must bring back into Court the sums they had withdrawn together with interest thereon at $3\frac{1}{2}\%$ per annum and on their failure to do so the sums should be realised by the Court by attachment and sale of the properties of the decree-holders and by attachment of their persons. This order must be justified apparently on the ground that Courts have inherent power by any means to correct their own error.¹

There are two points noticeable on the merit of this decision. First, the change in the expression of the provision under the Code of 1908 was not noticed nor was the case of *Ram Pertab v. Madho Rai*,² where even under the Code of 1882, that Court took a contrary view. Secondly, in that case an interim order of attachment of money was made under Order 38 rule 5 (3) and the money having been brought into Court by the garnishee, for some unexplained reason, the application for attachment before judgment was not further considered, although the case came before the subordinate judge on many occasions. Ultimately an *ex parte* decree was made in favour of the plaintiffs. The position consequently on that date was “*that the application for attachment before judgment lapsed.*” When therefore the decree-holder proceeded to ask for payment in execution by an application for payment, there was no further attachment made in execution and the learned judge said that the sub-

1. See Vol. I 293.

2. (1902) 7 C.W.N. 216. This case was brought to the notice of the Court in 39 Cal. 104 (118) but the same Judge did not then seriously apply his mind to it.

ordinate judge was under a wrong impression " that a valid order for attachment before judgment had been previously made and was still in operation." It is not possible to appreciate the learned judge's use of the word '*lapsed*' and the consequent opinion that no valid order of attachment before judgment was in existence at all after the decree. Under rule 5 an interim order of attachment is made and under rule 6 on hearing the defendant, the Court either directs the attachment or withdraws the attachment, in case a conditional attachment has been made and under rule 9, when the suit is dismissed, the Court shall order the attachment to be withdrawn. The attachment, conditional or absolute, is not affected by a decree in the suit and a conditional order can be made absolute even after the decree is passed. There is therefore no authority for saying, nay, the authority is to the contrary, that an interim attachment *lapses* on the passing of the decree if no final order of attachment is made. So long as the application for attachment before judgment remains on the files of the Court without a proper disposal, it must be deemed to be pending and if the Court does not choose to do its duty by proceeding to an order under rule 6 after notice is issued under the conditional attachment, the omission cannot prejudice the rights of the plaintiffs secured by the conditional attachment. This question was of no particular importance in the case before the learned Judge, because he was of opinion that the Court had no jurisdiction to attach the debt payable beyond its local jurisdiction, but the view that the order lapsed and the conditional attachment did not continue to exist, with all respect, cannot be maintained. It is possible in that case to say that

Surendra-nath v. Bansi Badan.

because on the issue of the conditional attachment the garnishee paid the money attached into Court and the defendant raised no further objection, the Court must be deemed to have accepted the payment under the attachment and thereby confirmed the attachment and on the payment having made the Court had nothing more to do but to consign the records to its rooms.

Power of
Small Cause
Court to
attach im-
moveables.

In Calcutta it has been held that a Provincial Small Cause Court has jurisdiction *to order attachment* of immovable property before judgment and that there is a difference between ordering the attachment of property and attaching property, so that if a Small Cause Court passes such an order, it would have to send the order to an ordinary Civil Court to execute the order.¹ In Nagpur, it has been held, that a Small Cause Court has power not only to order attachment of immovable property before judgment but also to make the attachment, for "the method prescribed by rule 54, Order XXI, for attaching immovable property presents no special difficulty to the process-serving staff of a Small Cause Court."²

A contrary view was taken in Madras. In *Jalari Rama Krishnayya v. Paida Seshana Chetty*,³ the Madras High Court said. "The District Munsiff has decided that there can be no attachment of immovable property before judgment in a Small

1. *Barada Kanta Raya v. Shaikh Majuddi*, (1924) 28 C.W.N. 1056, [approving in this view of *Kedarnath v. Hemnath*, (1922) 49 Cal. 994 and overruling *Sadek Ali v. Samed Ali*, (1923) 28 C.W.N. 16], WALMSLEY and CHOTZNER JJ. *dissenting*.

2. *Kanchedi v. Kanchedi*, (1917) 14 N.L.R. 1=43 I.C. 123.

3. C.R.P. 661 of 1918 (unreported), 36 M.L.J. Notes of Cases 17. The change on the language of the Code of 1908 pointed out in Calcutta was not noticed in this case.

Cause Court. We think that reference to section 7 (a) (iii) of C.P. Code is sufficient to justify this decision. We need add only that the absence of explicit provision of allowing or disallowing the exercise of powers under Order XXXVIII by Small Cause Courts is probably due to an intention to allow them the use of those powers in respect of moveable property. The general rule is laid down in *Marthamma v. Kittu Sheregara*,¹ as being that a Court, which cannot make an attachment in execution of a decree, cannot make one in anticipation of it; and we respectfully adopt that as the basis of our decision." On this latter case Mukherji J. said, in the Calcutta Case, that the principle which "was applied to the Code of 1859 in a case decided under Act XI of 1865 which provided by section 47 for the application of the provisions of that Code to Provincial Courts of Small Causes 'so far as the same are or may be applicable' cannot have any appreciable force under the present enactments, the more especially as the immediate objects of the two kinds of attachment are widely different." The learned Judge added, "No doubt a Provincial Court of Small Causes cannot deal with immoveables in execution of its decree or order a sale of immoveables; nor can it be doubted that it cannot make an order of attachment of immoveable property to compel a witness to appear and that is so because it cannot order the sale thereof. The occasion for the exercise of these powers and the circumstances connected therewith, however, are so different from those relating to the power to order attachment of immoveables before judgment for protecting the plaintiff's interest, that no analogy can be drawn

1. (1871) 6 M.H.C.R. 91.

from the exclusion of these powers." It is for the Legislature to remove the cause of this difference of opinion as early as possible.

IN LOWER BURMA, the following rules have been added to Rule 45.

45. A (1) Before issuing a warrant for the attachment of movable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that, the attaching decree-holder has produced a receipt in Form 15 A, Appendix E, from the Bailiff that he has paid in cash as process-fees under Rules 17 (1) (b) and (2) of the Process-Fees Rules not less than Rs. 10, for each person whom the Bailiff considers should be employed. (2) In sending the warrant for execution to the Bailiff the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record, the Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced. (3) At the time of the attachment of the property the Bailiff shall give the attaching decree-holder a notice in Form (Civil) 78 A, stating the date on which the fees paid under sub-rule (1) will be exhausted, and warning him that the property will not be kept under attachment after that date unless further fees are paid before that date. The payment of any such further amount shall immediately be certified to the Court Clerk by the Bailiff in Form 15 A of Appendix E. If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs. (4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15A) file it in the record and make an entry to that effect in the diary. (5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in Rule 15 of the rules regarding process-serving establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process fees actually paid under the foregoing sub-rules. Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process servers' Fee" ("XVI-A, Law and Justice"—"Courts of Law"—"Court-fees realized in cash"). (6) The remuneration of temporary peons employed to take charge of attached property

shall be paid direct by the Bailiff to them on the order of the Judge. Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits that all amounts previously drawn have been disbursed to the proper persons. (7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a repayment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I. (8) When an attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons that the total amount of the fees actually paid under sub-rules 1 and 3 exceeds the total amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer. (9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order a copy of which shall be placed on the record, to make such refund. If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff the officer shall make the refund in the ordinary way prescribed in his Register II for repayments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I, and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or Sub-Treasury.

45 B (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45 A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit. Explanation.—The costs in question might be, for example, (a) rent of building in which to store attached furniture, (b) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody, (c) costs of feeding and tending live-stock, (d) cost of proceeding to the place of attachment to sell perishable property. (2) If the attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued. (3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any

repayments thereof shall be made according to existing orders. (4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted. (5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court. Where the attached property consists of cattle these may be employed, so far as is consistent with Rule 43, in agricultural operations. (6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when Rule 45 applies. Whenever live-stock is placed at the place where it has been attached the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer. (7) Whenever property is attached, the officer shall forth-with report to the Court, and shall with his report forward an accurate list of the property seized. (8) If the debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders. (9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Bailiff, he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical. (10) If there be a Government pound in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description. (11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it the officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court. (12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-rule (2) or (4), the Bailiff's officer shall inform the debtor, or, in his absence, an adult member of his family that the property is at his disposal. (13) If any portion of the deposit made under sub-rule (1) or (4) remains unexpended it shall be refunded to the decree-holder in

the manner prescribed for such refunds in sub-rule 9 of Rule 45-A. Any difference between the costs of attachment of moveable property (other than costs referred to in Rule 45 A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the fault of the Bailiff, be recovered from the sale-proceeds of the attached property, if any, and if there are no sale proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government.

In Lower Burma the following is added. " 46-A. When a debt alleged to be due by a third party to a judgment-debtor has been attached under rule 46 and has not been paid into Court under sub rule (3) of that rule, the Court may, on the application of the decree-holder, issue a notice to such third party in Form Civil 74. A copy of such notice shall also, if possible, be served on the judgment-debtor. When at the hearing of such notice the third party shows no cause, and admits the debt to be due, the Court may intimate to him that he should pay into Court the amount admitted by him to be due, or so much thereof as may be sufficient to satisfy the decree, and that if he fails to do so he may be subjected to a suit.

CHAPTER XVIII

Claims and Objections

Court of execution must determine objections—Court having custody of attached property—Simultaneous attachment by two Courts—Nature of the rule in such cases—Effect of sale in such cases—Court bound to order attachment—Objections by party to suit—in attachment in execution—in attachment before judgment—S. 47 or or. 21, rules 57-63—Objection by strangers—Investigation of claims—Rules applicable to all kinds of attached property—Rules inapplicable to mortgage-decrees—Rules applicable to attachment before judgment—Limit of time for claim—Who can claim—Evidence in claim—Objections to garnishment—Defences available to garnishee—If debt is denied—If debt is admitted—Order on garnishee to pay—Extent of investigation—Order not confined to possession—Dismissal for delay—Appeal and revision—Order conclusive after a year—Where claim is allowed—Where claim is disallowed—Rule applicable to attachment of debts—Investigation under C.P. Code, 1882—Change in the law—Investigation need not be regular—Instances of inconclusive orders—Order benefits only the particular decree-holder—Order conclusive only in respect of the particular property—After-acquired rights left unaffected—Order does not generally affect judgment-debtor—But judgment-debtor may be bound by the order—Where judgment-debtor is not a party to the proceedings—Where judgment-debtor is a party to the proceedings—The order does not bind the auction-purchaser—Rule of one year for suit is absolute—No need for suit if attachment is withdrawn within a year—Attachment raised after one year is of no avail—Remedy by suit alternative—Limitation for suit—Art. 11 shortens limitation—Art. 11 does not extend limitation—Nature of suit under rule 63—Parties to suit—Burden of proof—Scope of inquiry—Valuation for court-fees—Valuation for jurisdiction.

Court of execution must determine objections.

All objections to attachment of property must be generally determined by the Court of execution. Under Section 47, C.P. Code, 1908,

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be deter-

mined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.”¹

“Where property to be attached is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such Court.”² The custody contemplated by this rule is actual custody and not custody in anticipation.³ “Court” does not include Collector.⁴ The Presidency Small Cause Court has jurisdiction to try the question of title to tiled huts when such a question arises in execution.⁵

Simultaneous execution by two Courts.

Where the property of a judgment-debtor lying in Court was attached by more than one creditor, in

Nature of the rule in such cases.

1. For a full discussion of the scope of this section, see Vol. I, Chapters VI, VII, and VIII.

2. C.P.C., O. 21, r. 52 (=Old Code, S. 272).

3. *Muttu Karuppan v. Muttu Ramalinga*, (1883) 7 Mad. 47 ; *Tulaji v. Balabhai*, (1896) 22 Bom. 39.

4. *In the matter of Brojanath Mitter*, (1870) 13 W.R. 301.

5. *Gunpathy Roy v. Thakurdye*, (1907) 34 Cal. 823.

execution of decrees of different Courts, the question of priority must be decided only by the Court in whose custody the property is and not by the attaching Court.¹ Where the Court of Small Causes holds custody of attached property and an attachment is made by the High Court, the former is the Court that must adjudicate on questions raised by the claimant.² But where the judgment-debtor's property was attached and a payment order was made by the attaching Court, previous to the other attachment in execution of the decree of the other judgment-creditor, the Court in whose custody the property is, would cease to have any power of disposal over it and any order by such Court on the question of title or priority would be wrong.³ Under Sections 68-70, a Collector is not empowered to adjudicate upon a question of title under Order 21 rule 58, of C.P. Code.⁴

Under Section 63 of the C. P. Code, 1908, “(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. (2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.”⁵

1. *Gopzenath v. Achcha Bibee*, (1881) 7 Cal. 553.

2. *Jeynarayan v. Ismail*, (1895) 19 Bom. 710.

3. *Gopzenath v. Achcha Bibee*, (1881) 7 Cal. 553. See *Muttalagiri v. Muttayyar*, (1883) 6 Mad. 357.

4. *Nathoo Ram v. Raja Vijaya Bahadur*, (1895) 9 C.P.L.R. 113.

5. C.P.C., S. 63 (=Old Code, S. 285).

Every holder of a money decree who attaches the property of the judgment-debtor is entitled to share equally with other creditors, in the assets subsequently realised or received by the Court. When the attachments are made by several Courts, the receipt of the assets by the highest Court is on behalf of the other Courts also and for the purposes of convenience the Court of the highest grade determines upon all claims and objections. A person whose attachment is anterior or whose attachment is effected under an order of a superior Court, has no preference over other decree-holders, who have attached, subsequently or in inferior Courts, the same property of the same judgment-debtor.¹ This rule applies to the attachment of all kinds of property, moveable and immoveable.²

The Court of a subordinate judge is superior to a Court of Small Causes³ and in the North-West Provinces the Court of a Munsiff is of a higher grade than a Court of Small Causes.⁴ As between a Civil Court and a Revenue Court, this restriction does not apply and the sale that is earlier passes the title.⁵

1. *Narasimhachari v. Krishnamachariar*, (1914) 26 M. L. J. 406=23 I. C. 909.

2. *Chunnilal v. Debi Prasad*, (1890) 3 All. 356; *Muthukaruppan v. Muthuramalinga*, (1883) 7 Mad. 47. But in *Obhoy Churn v. Golam*, (1882) 7 Cal. 410 it was doubted if it applied to immoveables. See also *In re Badri Prasad*, (1882) 4 All. 359; *Dwarkanath v. Banku Behari*, (1891) 19 Cal. 651.

3. *Turmuklal v. Kalyandas*, (1895) 19 Bom. 127; *Abdul Karim v. Thakordas*, (1896) 22 Bom. 88; *Himmat Singh v. Bhaqwat*, (1900) 13 C. P. L. R. 145. See *Krishna Kumar Ghosh v. Pasupati Banerjee*, (1921) 25 C. W. N. 740=63 I. C. 11.

4. *Balu v. Raghubar*, (1893) 16 All. 11 F. B.

5. *Raghubar v. Banke Lal*, (1900) 22 All. 182; *Roshan Lal v. Mashkur*, (1921) 19 A.L.J. 643=63 I. C. 90 (The Code of 1908 has not altered the law).

For an application of this rule, it is essential that more than one attachment must exist at the date of the sale. When therefore the same property attached in execution of decrees obtained on the first and second mortgage of it by two Courts of a lower and higher grade respectively, is, after its sale by the latter Court, ordered by the lower Court to be sold in execution of *its* decree, such sale is not invalid, as at the time it was ordered, the property was not under attachment in execution of the decree of the Court of the higher grade, as that decree had been executed by the sale of the property.¹

To get rateable distribution the decree of the other Courts need not be transferred to the Court of the highest grade, which administers the assets and an application made to that Court will be sufficient to grant them a share.²

Effect of sale
in such cases.

Under the Code of 1882, there was a difference of opinion on the question whether this provision was a rule of procedure only or was capable of affecting the jurisdiction of the inferior Court and the Court of the subsequent attachment. In Allahabad, it was thought that, for instance, when the same property was attached in execution of two decrees by a Subordinate Judge and a District Munsiff, a sale by the latter was void for want of jurisdiction.³ But a contrary view was taken by the other Courts. In Calcutta, the purchaser under

1. *Stowell v. Ajudhia*, (1884) 6 All. 255.

2. *Mohan Lal v. Humayun*, (1910) 13 O. C. 291=8 I.C. 372; *Ma Nyein v. Maung Gyi*, (1915) 29 I.C. 21. See also *Somasundaram v. Alagappa*, (1910) 8 I.C. 1176.

3. *In re Badri Prasad*, (1882) 4 All. 359; *Aghorenath v. Shamasundari*, (1883) 5 All. 615; *Balkishen v. Narain Das*, (1896) 18 All. 348; *Cheranji v. Jawahir*, (1904) 26 All. 538; *Har Prasad v. Jagan*, (1904) 27 All. 56; *Durpati v. Ramrach*, (1909) 31 All. 527; *Musst. Najmunnissa v. Lala Jamna Das*, (1909) 1 I. C. 78.

a sale, though held by the inferior Court, or by the Court whose attachment was the later, acquired an indefeasible title, if the purchase was made and the sale was held by that Court, without notice of the attachment made by the superior Court or of an attachment made earlier by a Court of the same grade,¹ and the superior or the other Court would be acting with discretion by refusing to resell the property under its own attachment.²

In Bombay, the purchaser under the circumstances acquired a valid title,³ if he himself had no notice of the other attachment, which is prior to his own or has been made by a superior Court, and whether the Court that sold the property to him had notice of such attachment was said to be immaterial.⁴ A broader view was taken in Madras,⁵ and a mere notice of an attachment by a superior Court to the Court which ordered the sale cannot oust the jurisdiction and the sale is not a nullity,⁶ nor can the knowledge of the attaching creditor of such attachment have that effect of vitiating his purchase.⁷

To avoid this conflict of opinion the present Code expressly enacted, that "nothing in this section

1. *Bykantnath v. Rajendro*, (1885) 12 Cal. 333 ; *Dwarkanath v. Bankee Behari*, (1891) 19 Cal. 651 ; *Ram Narain v. Mina Koery*, (1897) 25 Cal. 46 ; *Gopi Chand v. Kasimunnissa*, (1907) 34 Cal. 836 ; *Girischandra v. Sri Krishna De*, (1923) 38 C. L. J. 266 = 75 I. C. 325.

2. *Bykantnath v. Rajendro*, (1885) 12 Cal. 333.

3. *Patel v. Haridas*, (1893) 18 Bom. 458 ; *Turmukhlal v. Kaliyandas*, (1894) 19 Bom. 127.

4. *Abdul Karim v. Thakordas*, (1895) 22 Bom. 88. On the other hand, in *Himmat Singh v. Bhagwat*, (1900) 13 C.P.L.R. 145, the sale was upheld because the inferior Court had no notice of the attachment by the superior Court.

5. *Kunhayyan v. Ithukutti*, (1899) 22 Mad. 295.

6. *Narayanan v. Tawker*, (1916) 32 I.C. 927.

7. *Narayan v. Megaji*, (1917) 33 M.L.J. 217 = 41 I C. 612.

shall be deemed to invalidate any proceeding taken by a Court in executing one of such decrees", so that irrespective of any notice of other attachments elsewhere to the Court making the sale,¹ or to the purchasers at that sale,² the sale becomes absolute and is not vitiated by that irregularity.

When property is so sold away by the Court not authorised to do it under this rule, the proper course is for the proceeds to be sent up to the Court authorised to realise the amount from the properties attached for distribution.³

When a Subordinate Judge declined to proceed with the sale of property in execution of a decree in his own Court, on the ground of attachment of the same property under a decree in the District Court and dismissed the application for execution on the impression that proceedings ought to be taken in the District Court, the order was one falling under Section 47 and was appealable.⁵

Court bound
to order
attachment.

Where a decree-holder applies for attachment of certain property as belonging to his judgment-debtor, the Court executing the decree cannot *suo motu* refuse to attach it on the ground that it does not belong to the judgment-debtor, and the proper procedure is to allow attachment and in the

1. See *Narayanan v. Tawker*, (1916) 32 I.C. 927.

2. *Narayan v. Megaji*, (1917) 33 M.L.J. 217=41 I. C. 612.

3. *Obhoy Churn v. Golam Ali*, (1881) 7 Cal. 410; *Bykanthnath v. Rajendro*, (1885) 12 Cal. 333; *Patel v. Haridas*, (1894) 18 Bom. 458; *Bhagwan Chandra v. Chandra Mala Gupta*, (1901) 29 Cal. 773; *Nilkanta v. Gosto*, (1919) 46 Cal. 64; *Ramjash v. Gurucharan*, (1909) 11 C.L.J. 69=3 I.C. 105.

4. *Narayanan v. Tawker*, (1916) 32 I.C. 927.

5. *Surendranath v. Shyama Charan*, (1917) 26 C.L.J. 42=42 I.C. 466.

case an objection be filed to decide it in accordance with law.¹

An objection to an attachment can proceed from any person, whether he is a party to the suit or not. If he is a defendant or his legal representative, an objection by him on the ground that the property is not, under any provision of law, attachable or that the property belonged to the legal representative personally or the like must be raised and decided by the Court of execution under S. 47 C. P. Code.² The order then made is a decree and is appealable.

Objections by party to suit.

But if the objection by the judgment-debtor or his representative is on the ground that he holds the property attached on behalf of a third party, for instance as a trustee, the objection does not come under section 47, but falls under Order 21 rule 58.³ An order made on such objection is not appealable, but must be set aside by a regular action.

in attachment in execution.

Where in execution of a money decree obtained against one only of the several heirs of a deceased Mahomaden debtor in possession of the debtor's estate, the decree-holder proceeded to attach a property which formerly belonged to the deceased, but was opposed by persons in possession under a title derived from the judgment-debtor, it was held that since, if the execution had been sought against the property in the hands of the judgment-debtor himself, he could have objected to the attachment and

1. *Diwan Chand v. Mer Khan*, (1907) P.W.R. 18.

2. See Vol. I. 205-209; *Kali Charan v. Jewat*, (1906) 28 All. 51; *Shankar Sat v. G. Harman & Co.* (1825) 17 All. 245.

3. See Vol. I. 210-211; *Budrudeen v. Abdul Rahim*, (1908) 31 Mad. 125; *Shankar Dial v. Amir*, (1880) 2 All. 752; *Rooj Lall v. Bekani Meah*, (1888) 15 Cal. 437.

sale of the rights and interests of the other heirs, it was equally open to the defendants, the transferees of the judgment-debtor to do the same and that being so, the defendants were entitled to set up the *jus tertii* of the heirs of the deceased debtor other than the heir who was the judgment-debtor and under the decree the plaintiff could proceed against the interest of such judgment-debtor alone in the estate of the deceased.¹ It is competent to a party to set up in execution proceedings a claim which he might have set up by way of defence in the suit itself, but which he was then under no obligation to do.²

in attachment
before judgment.

When an objection is preferred by a defendant to the attachment of his property before judgment, the nature of the powers exercisable by the Court to try the objection appears to be doubtful. Unless a decree is passed and an application for execution of the decree is presented for the sale of property attached before judgment, the attachment before judgment cannot become converted into an attachment in execution³ and before a decree is passed, there is no occasion for the operation of section 47, under which the judgment-debtor's objection can be investigated by the Court of execution. Nor do the provisions of Order 38 rule 8 apply at that stage, because under that rule "Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money" and this has reference only to

1. *Atchayya v. Bangarayya*, (1892) 16 Mad. 117.

2. *Dallu Mal v. Hari Das*, (1901) 23 All. 263; see *Seth Chand v. Durga Dei*, (1889) 12 All. 313 F.B.

3. See page 254 *supra*.

claims and objections of persons who are not parties to suit. It appears therefore that there is no express provision of law by which the Court is empowered to deal with objections advanced by the defendant to the attachment of his property before judgment. Such objections may be advanced, for instance, by the defendant when he is sued as a legal representative of the debtor, on the ground that the property belongs to himself and that the debtor whom he is made to represent in the pending suit had no interest in it. In *George v. Ram Rutten*,¹ the defendant's wife opposed the attachment before judgment and the Court, making her a party to the suit released the property and it was held that the order, although irregular, must be taken to have been passed under the section of Act VIII of 1859, which corresponded to Order 38 rule 9 of the C.P. Code, 1908.

The question whether an order is governed by Order 21, rule 63 or S. 47 depends upon what the claimant alleges in his claim petition on which the Court passes its order and not on what the Court finds in its said order to be the real state of facts at the close of the enquiry into the claim petition. Of course if the allegations in the petition show that the claimant is really a trustee for the judgment-debtor or is really a representative of the judgment-debtor, he cannot evade the provisions of Section 47 by choosing to call his application one under Order 21 rule 58. But if the petition discloses a claim by the objector in his own right and he is not a representative of the judgment-debtor, the objection will be governed by rules 58-63. So where certain trustees alleged in their petition that they were the trustees appointed for the benefit of

S. 47 or O. 21,
rules 58-63.

1. 3 Agra 272.

the creditors of the judgment-debtors but the Court found that they held the property for the benefit of the judgment-debtors it was held that the rules applied and that an appeal against the order was not maintainable.¹ If in execution of a decree the assets of the deceased judgment-debtor are attached, the claim of a reversioner objecting to the attachment, when he was not a party to the decree or to the execution, falls not under section 47, but under rule 58.² Where the petitioner was impleaded as the 4th defendant in the suit on the mortgage as the subsequent purchaser of a portion of the mortgaged property, and after that decree was passed he obtained a transfer of a prior mortgage from a stranger covering these self-same properties and in answer to notice for execution, he asks that his prior mortgage should be recognised and the property sold subject to it, the position is this. While, so far as the decree was concerned, he was bound by it as the subsequent purchaser of a portion of the mortgaged property his present objection is based on a new and independent interest derived after that decree. The determination of the validity and subsistence of the mortgage debt and the transfer does not relate to the payment, discharge or satisfaction of the decree sought to be executed and the question does not fall therefore within the scope of Section 47,³ and the petitioner's objection cannot be inquired into by the executing Court.

Objection by
strangers.

“(1) Where any claim is preferred to, or any objection is made to the attachment of, any property

1. *Muthukumara v. Alagappa*, (1914) 21 I.C. 748.

2. *Bansidhar v. Sham Lall*, (1923) 71 I.C. 1012.

3. See for a similar view *Bindubasini v. Srimanta*, (1918) 47 I.C. 374.

attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit: Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection."¹

"The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached."²

Investigation
of claims.

"Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment."³

1. C.P.C., O. 21 r. 58 (= Old Code S. 278).

2. *Ibid.*, r. 59 (= Old Code S. 279).

3. *Ibid.*, r. 60 (= Old Code S. 280).

“Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.”¹

“Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.”²

“Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.”³

It is laid down in rule 58, aforesaid, that the Court shall proceed to investigate the claim or objection in all respects as if he was a party to the suit; so that it is inferred that this body of rules relating to summary remedy in claims refers only to claims by persons who are not parties to suit.

Rules applicable to all attachable property.

These provisions apply to all property of which attachment can be made under the C. P. Code. Property, when applied to land, includes also any interest or share in the land attached.⁴

A ‘debt’ is property attachable in the manner provided in Order 21 rule 46. So are other species of

1. *Ibid.*, r. 61 (= Old Code, S. 281).

2. *Ibid.*, r. 62 (= Old Code, S. 282).

3. *Ibid.*, r. 63 (= Old Code, S. 283).

4. *Cowar Rajkumar v. Kadambini Debi*, (1870) 4 B.L.R. 175 F.B.

intangible property, such as equity of redemption.¹ It was said in *Chidambara v. Ramasawmy*,² that the words 'possess' and 'possession' used in these rules included constructive possession or possession in law, of debts and other intangible property.

When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open to the Court to ascertain the true nature of the property. Where, for instance, a claimant contended that the property attached in execution of a rent-decree was neither a tenure nor a holding within the meaning of S. 170 of the Bengal Tenancy Act, but a piece of homestead land let out for building purposes to which the provisions of the Act have no application, it was held that the Court had jurisdiction to investigate the claim, as the claimant was, in no way, bound by the recital in the decree under execution to which he was not a party.³

These proceedings are inapplicable to mortgage-decrees, because in execution of a decree for sale on a mortgage, no attachment is necessary and the decree itself contains the order for sale.⁴ Unless there is an attachment authorised by law, the

Rules inapplicable to mortgage-decrees.

1. *Anrata v. Pandarinath*, (1900) 2 Bom. L.R. 134.

2. (1903) 27 Ma', 67 F.B.; *Brajabala v. Gurudas*, (1906) 33 Cal. 487; *Po Kya v. Lutchminappian*, (1903) 4 L.B.R. 289; *Tyaballi v. Atmaram*, (1914) 38 Bom. 631. For earlier cases contra, see *Harilal v. Abhesang*, (1880) 4 Bom. 323; *Basavayya v. Syed Abbas*, (1900) 24 Mad. 20.

3. *Sarba Sundari Dasi v. Harendra Lal Roy Chowdhury*, (1909) 12 C.L.J. 549=7 I.C. 490.

4. *Deefholts v. Peters*, (1887) 14 Cal. 631; *Himatram v. Khushal*, (1893) 18 Bom. 98; *Soonoo Modi v. Latkari*, (1905) 1 N.L.R. 142; *Ragho Pahan v. Lachon Koer*, (1919) Pat. 79=50 I.C. 448; *M. G. Mra Tun v. U. Kaing*, (1915) 8 Bur. L.T. 214=29 I.C. 941.

summary remedy by way of a claim is not available. The Court has no jurisdiction to entertain a claim in such cases and if it does entertain, the High Court may interfere in revision.¹ If the executing Court does, in the case of a mortgage decree, take action under these provisions it applies a procedure inapplicable, and the statutory bar contained in rule 63 will not operate to exclude a suit by either party.²

So where property is proclaimed for sale under a mortgage decree, wherein a prior mortgagee was not impleaded, the Court of execution has no jurisdiction to let the prior mortgagee to intervene and to allow his objection.³ Where a person is aggrieved by the alienation of property by a stranger, while it is really his, his remedy is not to object in execution of the decree on the mortgage but to institute a regular suit to declare his title.⁴ But a mortgagee in possession was held entitled to apply for the withdrawal of the attachment.⁵

Rules
applicable to
attachment
before judgment.

These provisions relating to claims and contained in Order 21 rules 58 to 63 are applicable to property attached before judgment also. In *Prasada Naidu v. Virayya*⁶ the Full Bench of Madras said "Section 86 of the Code of Civil Procedure of 1859, which was re-enacted without material alteration in section 487 of the Code of 1877 and in Order

1. *Ratan Lal v. Bala Prasad*, (1918) P.R. 58=44 I.C. 986; 18 I.C. 215; *Tara Chand v. Raj Kishore*, (1920) 2 Lab. L.J. 343=55 I.C. 395.

2. *Joy Prokush v. Abhoy Kumar*, (1897) 1 C.W.N. 701.

3. *Hukam Singh v. Raghubir*, (1905) 27 All. 700.

4. See *Sanwal Das v. Bismillah*, (1897) 19 All. 480; *Zamindar of Karvetnagar v. Trustee of Tirumalai &c.*, (1909) 32 Mad. 429.

5. *Kassisa v. Vithaldas*, (1873) 10 B. H. C. B. 100.

6. (1918) 41 Mad. 849 F. B. [overruling *Ramanamma v. Bathula Kamaraju*, (1918) 41 Mad. 23]; *Muthukumara v. Alagappa* (1914) 21 I. C. 748

XXXVIII, rule 8 of the present Code, admittedly had the effect of applying to claims in respect of attachments before judgment all the provisions of section 246 of that Code, including the final provision enabling the party against whom the order was given to bring a suit to establish his right at any time within one year from the date of the order. By the Indian Limitation Act (IX of 1871) the provision as to limitation was taken out of section 246 and dealt with in Article 15 of that Act. In the Code of 1877, sections 278 to 283 were substituted for section 246 of the Code of 1859. In section 283, which corresponded to the last sentence of section 246, the language was altered, but there was nothing in the alteration from which an intention to make any of these provisions inapplicable to attachments before judgment could be inferred, nor is there anything of the sort in the changes made in the Code of 1908. The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of. As has been pointed out to us, this section was applied without question to a case of attachment before judgment which came before the Privy Council in *Kissorimohun Roy v. Harsukh Das*.¹ In *Arunachalan Chetty v. Periasami Servai*,² it was held by the Full Bench at Madras that in respect of an order passed on a claim preferred for properties attached before judgment, a suit to set aside the order must be instituted within a year from the date of the order under Article 11 of the Indian Limitation Act, 1908 (3). A contrary view has been taken in the Punjab.³

1. (1890) 17 Cal. 436 P. C.

2. (1921) 44 Mad. 902 F.B.

3. *Ratan Lal v. Bala Prasad*, (1918) P.R. 58=44 I.C. 986.

Limit of time
for claim.

There is no limit of time expressly prescribed for a claim or objection against attachment. In *Abdul Kadir Sahib v. Somasundaram Chettiar*,¹ a claim by a mortgagee was dismissed on the ground that the sale had already taken place. In determining the effect of this order on limitation Spencer J. thought that the Court dismissed the applications as there was no object in keeping them pending and did not thereby pass any order against the claimant, so as to cause limitation to run against him and Krishnan J. said that it was an order refusing to investigate a claim on the ground of delay. There was a question whether the petition itself was not filed after the sale had been concluded and it was argued that if the petition was filed after the sale was concluded it was a nullity. Krishnan J. said that on the facts it appeared that the application had been made before the sale took place. On a reference to a third Judge under section 98, C.P. Code, Schwabe C. J. thought on the facts, that the sale had already taken place and said that the Court dismissed the application not on the ground of delay but on the ground that it had no jurisdiction to hear it. His Lordship agreed with Spencer J. in saying that there was no conclusive order for the purpose of limitation under Article 11 of the Limitation Act. In this case therefore it was not decided whether the Court has no jurisdiction to entertain a claim after the property attached had been sold.

*Gopal
Chandra v.
Notobar
Kundu.*

In *Gopal Chandra v. Notobar Kundu*,² the question raised was, "Whether it is competent to an execution Court to proceed with a claim appli-

1. (1922) 45 Mad. 827.

2. (1912) 16 C.W.N. 1029=15 I.C. 53.

cation under rule 58 of Order 21 of C.P. Code of 1908 after the execution sale has actually taken place." The learned Judges of the Calcutta High Court answered it in the negative. Mookerjee J. said "Rule 60 of Order XXI provides that where, upon the investigation contemplated in rules 58 and 59, the Court is satisfied that the claim ought to be allowed, it shall make an order releasing the property wholly, or to such an extent as it thinks fit, from attachment. It is thus plain that an order under rule 60 must be made before the sale has taken place. This is also made clear by sub-rule (2) of rule 58 which provides for the adjournment of a sale pending the investigation of the claim preferred under sub-rule (1). But it has been argued by the learned vakil for the opposite party that the Court below had, under section 151 of the Code, inherent power to allow the claim after the sale and to set aside the sale which had already taken place and had been confirmed. In support of this view, reference has also been made to the cases of *Tuffazal Hossein v. Raghunath Prasad*,¹ *Hira Lal Mukerji v. Premamoyee Debi*,² and *Gurdeo Singh v. Chandrikah Singh*.³ It is clear, however, that the doctrine of inherent power has no application to a case of this description. That doctrine is applied when the Court finds it necessary, for the ends of justice or to prevent an abuse of its process, to make an order for which no express provision has been made by the Legislature. *Panchanan v. Dwarka Nath*,⁴ *Hukum Chand v. Kamalanand*.⁵ In the case before us, rule

1. (1873) 14 M.I.A. 40.

2. (1905) 2 C.L.J. 306 (309).

3. (1909) 36 Cal. 193.

4. (1906) 3 C.L.J. 29.

5. (1906) 33 Cal. 927.

60 plainly indicates that an order upon an application under rule 58 must be made before the sale has taken place ; *upon the sale the application by which the claim has been preferred ipso facto terminates*. The effect of these statutory provisions cannot be flattered away by an earnest appeal to the doctrine of inherent powers, specially as the objector is not without a remedy. It is open to him to proceed under rules 99 and 100 after the property has been sold and an attempt is made by the purchaser to obtain delivery of possession thereof. It is also open to him to institute a regular suit for the declaration of his right which, if his allegations be true in fact, has not been affected by the execution sale. This, therefore, is a case where the Court would not exercise its inherent powers in contravention of the express provisions of rules 58, 59 and 60 of Order XXI of the Code of 1908."

It is submitted that the view that if a sale takes place, when a claim is pending investigation "*the claim ipso facto terminates*" is not tenable. The meaning of these last two words is not clear and a petition cannot terminate legally except by its allowance or dismissal and until so terminated, the petition will continue undisposed of on the files of the Court, unless the words mean that the Court refuses to investigate the claim. The Court cannot refuse to investigate a claim, except on the ground of delay and that ground of dismissal must be applied as soon as the application is presented and cannot justly be invoked simply because the sale takes place after the application of claim, for which the claimant is in no way responsible. While the law has prescribed limits of time for different applications, no such limitation has been made in the

case of claims, save that when the applicant is guilty of designed or unnecessary delay the application may be rejected on the ground of delay. When an attachment has been made, the occasion for a claim arises and the claimant has a right to have his claim investigated summarily and this right does not lapse even though the attachment has been subsequently raised.¹ When once the claim is entertained and is not rejected at once on the ground of delay, the Court will be exercising a wrong discretion in selling the property during the pendency of the claim and if the sale is made the purchaser takes it, subject to the result of the claim. In this respect the purchaser's position is the same, whether the claim is subsequently allowed in summary proceedings or in a regular suit. It appears therefore that even after the property has been sold, the Court is not by law precluded from entertaining a claim and in the case of the sale of moveable property that is perishable, the claim will attach to the sale proceeds.² Ordinarily a claim preferred after the attached property has been sold may be rejected on the ground of delay, but if, for instance, in a case where the claimant was not aware of the attachment, the Court does entertain the claim and allows it, the legal position will be this. If the property sold is immovable and has not been delivered to the purchaser, and the claimant's possession has not been disturbed, the purchaser will be entitled to have the sale set aside under Order 21 rule 91 and to a refund of his purchase money under rule 93. If the purchaser has been put in possession, the purchaser's rights will be the same and the claimant

1. *Sreeputty v. Kartick*, (1882) 9 Cal. 10.

2. *Ma Kyin v. Mutu Raman Chetti*, (1908) 4 L.B.R. 16.

can ask for reinstatement by way of restitution under the Court's inherent powers,¹ or by an order under Order 21 rule 100. If the property sold is moveable, the Court may exercise inherent powers for the redelivery of property by way of restitution and for the refund of the money and the right of suit for the recovery of the property or compensation is always available under Order 21 rule 78.

*Bhagchand
v. Mt.
Jhunia.*

A similar view was taken in Nagpur in *Bhagchand v. Mt. Jhunia*.² On a question raised as to whether a Civil Court had jurisdiction to entertain an objection, under S. 278 of the Code, of 1882, after the attached property had been sold, it was held that it was competent for a Civil Court to entertain such an objection after the property had been sold but before the confirmation of the sale, because "there is no reason for thinking that the Legislature intended to make the mere holding of a sale a bar to an objection under S. 278 and, further, though, under S. 313 of the Code, the auction-purchaser may himself apply to set aside the sale on the ground that the person, whose property purported to be sold had no saleable interest therein, yet it is distinctly to the auction-purchaser's advantage that a valid claim to the property should be established before he has paid away his money rather than afterwards."

Who can
claim.

A claim may be made by a person who has an interest in the property although he is not in possession. Where property belongs to the judgment-debtor and another, the co-sharer can apply to release his share from the attachment.³ A mort-

1. See Vol. I. 290.

2. (1905) 1 N.L.R. 167.

3. *Cowar Rajkumar v. Kadambini Debi*, (1870) 4 B.L.R. 175.

gagee in possession is in possession "on account of or in trust for" the mortgagor, to the extent of the mortgagor's interest. The property is not in the mortgagee's possession "as his own property" but partly on his account and partly on account of the mortgagor. Where mortgaged property in possession of a mortgagee is attached as his property and the mortgagor prefers a claim against the attachment, the claim should be investigated and the property released from attachment to the extent of the mortgagor's interest. So far as the interest of the owner and mortgagor is concerned, the property is not liable to attachment.¹ Where A and others, being judgment-debtors under a certain instalment decree, borrowed money to pay off the balance due under the decree, giving a mortgage on the property affected thereby, and the mortgagee paid the balance due under the above-mentioned decree into Court in his own name, but expressly on behalf of his mortgagors, and notice was issued to the decree-holder who drew out some of it, but subsequently the decree-holder sought to appropriate some of the amount so paid into Court to the payment of debts other than that due under the decree and to obtain attachment and sale of the property affected by that decree, which was then in the possession of the representatives of the mortgagee, it was held that, even if S. 278 of the Civil Procedure Code were exhaustive and the mortgagees were not entitled within the meaning of that section to object to the attachment of the property in question, they would still, as mortgagees in possession, be entitled to claim that the property should not be held liable to attachment under the former

2. *Nga Tok v. Subromonian Chetty*, (1910) U.B.R. 75=10 I.C. 994; *Kassisa v. Vithaldas*, (1873) 10 B.H.C.R. 100.

decree.¹ In *Biswanath v. Lingaraj*,² where in execution of a money decree against a judgment-debtor, his property, then in the possession of a usufructuary mortgagee was attached, the mortgagee's claim was rejected on the ground of delay and on the ground that there was no necessity for him to apply under rule 58. After the sale was made, the mortgagee resisted delivery and the Court said, "He (the mortgagee) could only apply under Order 21 rule 58 on the ground that the property was not liable for attachment. But there his position as a mortgagee did not entitle him to come to Court and argue that the property was not liable to attachment. The order passed by the Court in no way touched the interest of the mortgagee. He is now prejudiced because he has been dispossessed by the order of the Civil Court" and his application under Order 21 rule 100 was not barred.

Evidence in
claims.

The objector must prove his claim.³ This evidence if relevant must be received,⁴ though it must be confined to his own claim and must not be directed to establish the right of a third party.⁵ If in an investigation under rule 58 as to moveable property, a Court finds that the claimant was in possession at the time of attachment, and it is not proved by the attaching creditor that the claimant was in possession in trust for the judgment-debtor, the Court should remove the attachment. In an investigation under rule 59 of the Code of Civil Pro-

1. *Mitthu Lal v. Muhammad Ahmad*, (1891) A.W.N. 220.

2. (1922) 1 Pat. 159.

3. *Nga Tha v. Burn*, (1868) 11 W.R. 8 F.B.; *Gooroo Das v. Sona Mnee*, (1873) 20 W. R. 453; *Amrita v. Pandarinath*, (1900) 2 Bom. L.R. 134.

4. *Benode Lall v. Girsedhur*, (1874) 22 W.R. 392; *Bhoitarinee v. Nilmonce*, (1875) 24 W.R. 422.

5. *Nga Tha v. Burn*, (1868) 11 W.R. 8 F.B.

cedure, if a claimant to property, which has been attached, proves that, at the date of attachment, he was possessed of the property, the burden of proof that he is not the owner, or that he holds in trust for the judgment-debtor, is on the decree-holder, and if he fails to discharge it, the Court should remove the attachment.¹

If the garnishee does not dispute the debt due from him to the judgment-debtor he may pay into Court the amount of the debt or such portion thereof as has been attached or appear on the day named in the notice or fail to appear. In all these cases the order *nisi* will be made absolute.²

Objections to garnishment.

If he appears and prefers a claim or an objection that the debt is not liable to be attached, an order made against him in the inquiry is conclusive against him, unless set aside by a regular action within a year, so that by inaction for a year his liability becomes absolute and cannot be denied in defence to an action by the purchaser of the debt, or by a receiver appointed for its collection.³

An order made absolute under a mistake can be set aside whether it was a case of mutual mistake by garnishee and the judgment-creditor or not,⁴ and presumably also if there was a mistake on the part of Court, which it has inherent power to recall.

1. *P. K. A. C. T. Kadappa Chetty v. Maung Sheu Bo*, (1903) 2 L.B.R. 289.

2. *Randall v. Lithgow*, (1884) 12 Q.B.D. 525.

3. C.P.C., O. 21, rr. 58 to 63; *Chilambara v. Ramasami*, (1904) 27 Mad. 67 F.B., overruling (1901) 24 Mad. 20; *Tyaballi v. Atmaram*, (1914) 38 Bom. 631. For earlier view *contra*, see *Harilal v. Abhesang*, (1880) 4 Bom. 323.

4. *Moore v. Peachey*, (1892) 66 L.T. 198; *Marshall v. James*, (1905) 1 Ch. 432. See also *Burrell v. Read*, (1894) 11 T.L.R. 36.

Defences
available to
garnishee.

All defences available to him against his creditor are available to a garnishee. He may plead limitation, want of consideration, assignment, prior condition or discharge prior to notice.¹ The garnishee can only set off a debt due to him by the judgment-debtor, at the date of the order but not a debt becoming due after the date of the attachment.² The garnishee cannot however rely on a counter-action against the judgment-debtor.³ "A garnishee may assert any set-off or counter-claim which he might, but for the garnishment, have asserted against such defendant. Ordinarily a set-off or counter-claim cannot be asserted by the defendant unless it was due at the commencement of the action, but there are exceptions to this rule which obtain in Courts of equity, and they continue to be available, though the debt has been garnished. Where a bank in answer to a garnishment, disclosed that it was indebted to the defendant, but that it had certain set-offs or counter-claims against him which were not due, but that he was insolvent, and that it must be without remedy, if obliged to pay its debt to him without taking into consideration its claim against him, though not yet due, the right of the bank to set off was upheld."⁴

"The garnishee who paid over moneys can always plead the recovery and payment in bar to the same demand by his creditor provided his conduct in the garnishment proceedings had been characterised by good faith and he had presented

1. Freeman on EXECUTIONS, III, 2221.

2, *Sampson v. Seaton &c. Ry. Co.*, (1875) L.R. 10 Q.B. 28 ; *Tapp v. Jones*, (1875) L.R. 10 Q.B. 591 ; *Tyaballi v. Atmaram*, (1914) 38 Bom. 631.

3. *Stumore v. Campbell*, (1892) 1 Q.B. 314.

4. Freeman on EXECUTIONS, I, 814.

all the defences shown to him. But the order cannot protect the garnishee against the claims of one who was not a party to the proceeding unless he was an assignee and exposed the garnishee to the peril of the order by his failure to give notice of his assignment. So if an order is entered against a garnishee because of his failure to state truly all the facts known to him, it cannot protect him against a third person who was in fact entitled to the debt. This rule was applied when a garnishee had bought goods of brokers, with knowledge that they were not owners of the goods or under circumstances sufficient to put him upon enquiry and he subsequently in proceedings supplemental to execution against the broker testified that he owed them for such goods in consequence of which an order was entered against him to pay over the money to a satisfaction of the judgment against the broker. Payment having been made accordingly, it was held not to protect the garnishee against the principals of the brokers, because "the defendants had it in their power by stating the facts of the case to prevent the order being made. It was their duty to have done so and omitting it, without reason or excuse, their after-payment to the sheriff was in effect voluntary, not compulsory."¹

If the garnishee denies the debt he must appear to show cause against the order *nisi*. Under the English practice, an issue on the liability of the garnishee is tried and when the objection is disallowed or when the garnishee fails to appear to show cause, an order is made against him, on which

If debt is denied.

1. *Wright v. Cabot*, 89 N.Y. 570. Freeman on EXECUTIONS, III. 2237; *Hari Ram v. Hukamchand*, (1915) P.L.R. 50 = 28 I.C. 317.

execution may issue¹ or when execution cannot be issued, an action lies on the order at the instance of the creditor,² though he cannot however issue a bankruptcy notice based on the order,³

If debt is admitted.

Where a debt alleged to be due by a third party to the judgment-debtor is attached, the Court may under Order 21 rule 46 make an order upon the garnishee for the payment of such debt to the judgment-creditor in case the former admits it to be due or for so much as he admits to be due to the judgment-debtor. Where however the garnishee denies the debt the only course open to the decree-holder is to have the debt sold or to have a receiver appointed for its realisation.⁴ The purchaser of the debt can maintain an action for its recovery, subject to the merit of the garnishee's defences at the trial.

1. R.S.C., O. 45 rr. 4 to 6.

2. *Fritchett v. English and Colonial Syndicate*, (1899) 2 Q.B. 428 C.A. If the judgment-debtor has already brought an action, the creditor may be made co-plaintiff; *Wallis v. Smith*, (1882) 51 L.J. Ch. 577.

3. *Re Combined &c. Machine Co.*, (1889) 43 Ch. D. 99; *Ex parte Chinery*, (1884) 12 Q.B.D. 342 C.A.

4. *Toolsa Goolal v. Bombay Tramway Company Ltd.*, (1887) 11 Bom. 451; *Maharajah of Benares v. Patraji Kunwar*, (1905) 28 All. 262; *Natchappa Chetty v. Mahomed Jan*, (1902) 8 Bur.L.R. 91; *M. R. R. M. Firm v. Zan*, (1916) 35 I.C. 469. See C. P. C., O. 21, r. 79.

"If a person cited to appear denies the debt or asserts an adverse claim to property confessedly in his possession, but which is alleged to belong to such debtor, it is doubtful if any Court can be authorised in a summary proceeding and without giving the person summoned the benefit of a trial by jury, to determine the issue thus presented and if found against the claimant, compel him to pay the debt or deliver the property for the purpose of satisfying the judgment. If an order is made it must be enforceable only in a separate action. What the judgment-debtor could not do himself except by a regular action the Court could not recover in a summary way.....Where the debt is denied or an adverse claim is asserted, the Court will authorise an action to be

In *Panna Lal v. Bhagirathi Bai*¹ it was said that the sub-rule (3) of Order 21 rule 46 provides that a debtor may pay the amount of his debt into Court and that "it does not clothe the executing Court with any power to compel the garnishee to deposit the debt into Court if he denies it and inform the Court to that effect.....There is no provision in the Civil Procedure Code, analogous to that of rule 3 of Order XLV of the Rules of the Supreme Court, which would justify our Indian Courts to order execution to issue to levy the amount due from garnishee in the event of garnishee not disputing the debt due or claimed to be due from such debtor if he does not appear upon summons. But even the English law recognises the jurisdiction of Courts² to relieve the garnishee from the pernicious effect of his acquiescence when he remained inert and an order absolute was made and he became bound to pay the garnisher although no attachable debt existed at the time of the order."

Order on
garnishee to
pay.

In Burma, the procedure is laid down in Order 21 rule 46 (a) and all that can be done when the garnishee admits the debt but does not pay it into Court is to warn the garnishee that he is liable to be sued for the debt.³

Clause (3) of Order 21, rule 46, C. P. Code operates quite independently of any question as to the circumstances under which the payment was made or the motives which may have influenced

brought for the recovery of the property or debt and will forbid the making of any transfer thereof until the action can be prosecuted to judgment. In some States it is carried on by the creditors and in others through a receiver."—Freeman on EXECUTIONS, III. 2221—4.

1. (1924) 20 N.L.R. 11 = 78 I.C. 631.

2. See *O'Brien v. Killescu*, (1914) 2 Ir. R. 63.

3. *P.L.M. Firm v. D.M. Stacey*, (1916) 33 I.C. 169.

*Mahadeo
Prasad v.
Dirgbijai
Singh.*

the making of it. In *Mahadeo Prasad v. Dirgbijai Singh*,¹ M. P. had a decree against M. L. and in execution applied for the attachment under O. 21, R. 46 C. P. Code, of any debt which might be due by M. L. to D. The Court ordered the attachment but wrongly passed a further order directing D to pay in Court Rs. 1,000 on account of the debt. D filed objections, but admitted that at least Rs. 1,000 would be found due from him to M. L. on settlement of accounts between them. Thereupon the Court made the order positive, and under pressure of an order to attach D's house. D paid into Court without any condition a sum of Rs. 975 which was taken out by M. P. and H, another decree-holder who had applied for rateable distribution. D brought a suit against M. P. and H, for recovery of the money. It was held that as the plaintiff had really owed the money to M. L. and paid it into Court without any condition and thereby obtained a valid discharge pro tanto under O. 21, R. 46 (5) C. P. Code, he has no claim to any equitable relief and the suit did not lie; the suit was not one which came within the provisions of O. 21, R. 63, Civil Procedure Code, nor did it come within the provisions of S. 72 of the Contract Act, in as much as the payment was made under the admission that the amount was really due.

If the garnishee fails to appear, though in England, by virtue of the rules, the non-appearance is deemed to be an admission,² it is presumed that in India the position will be the same as when he appears and denies the debt. The view adopted in India is in consonance with the practice in America.

1. (1921) 43 All. 272.

2. R.S.C., O. 45, r. 6; *Randall v. Lithgow*, (1884) 12 Q.B.D. 525.

The C. P. Code does not prescribe the extent to which the investigation should go and it depends on the circumstances of each case.¹ Rule 59 does not mean that if the claimant establishes that he has some interest in the property he is entitled to succeed irrespective of the question of possession, nor does it imply that if he fails to establish the particular interest he sets up, his claim must be disallowed irrespective of the question of possession of the judgment-debtor.² In each of the cases mentioned in rules 60 and 61 the Court must determine the question of possession of the judgment-debtor and cannot found its decision merely on the question of the validity of the claim or of title to the attached property. "Some interest" in rule 59 means such interest as would render the possession of the judgment-debtor, possession not on his own account but on account of, or in trust for some other person. In other words, the Court should confine itself to determining whether or not the property was in possession of the claimant on his own account at the time of the attachment.³ The words 'in trust for' should be construed in the sense that the claimant held the property as servant or agent for or otherwise on behalf of the judgment-debtor, and that he had no right whatever to the possession of it on his own account if the judgment-debtor claimed it.⁴ The words "the possession of some person in trust for him" in rule 60 refer to cases in which the possession of a claimant as a trustee is

Extent of
investigation.

1. *Sardhari Lal v. Ambika Prashad*, (1888) 15 Cal. 521 P.C.; *Rahim Bux v. Abdul Kader*, (1904) 32 Cal. 537.

2. *Satkari Mandal v. Tirtha Narain*, (1914) 24 I.C. 62.

3. *Koylash v. Koylash*, (1884) 10 Cal. 1057; *Khelat Chunder v. Bhuggobutty*, (1870) 14 W.R. 144.

4. *P. K. A. C. T. Kadappa Chetty v. Maung Shau Lo*, (1903) 2 L.B.R. 289.

of such a character as to be really the possession of the debtor and not to a case in which an intricate question of law may arise as to whether valid trusts may result in particular instances.¹

The mere fact that the judgment-debtor has some beneficial interest in the income of the property would not render the property liable under rule 61. Therefore when a claim is put forward under rule 58 and a claimant or objector satisfies the Court that he has some interest in, or is possessed of, the property attached and it does not appear that the possession of the objector was in reality the judgment-debtor's, the claim must be allowed.² When after the High Court empowered the Administrator-General to collect the assets due to a deceased person, a decree was passed against the assets, in a suit in which the legal representative of the deceased debtor was impleaded as the defendant, and a debt due to the deceased was attached, the Administrator-General was exclusively entitled to collect the debt and was therefore entitled to have the attachment vacated.³ Where in a mortgage bond executed in the name of R, the moneys were expressly mentioned as belonging to four others and were, when repaid, to be distributed by R to all the lenders, these latter had "some interest" in the property attached to entitle them to prefer a claim that the attachment of the property in a decree against the mortgagor might be subject to their

1. *Hamid v. Buktear*, (1887) 14 Cal. 617 ; *Sheoraj Nandan v. Gopal*, (1891) 18 Cal. 290.

2. *Sheoraj Nandan v. Gopal*, (1891) 18 Cal. 290 ; *Monmohiney v. Radha Kristo*, (1902) 29 Cal. 543.

3. *Bhaji Bhimji v. Administrator-General of Bombay*, (1898) 23 Bom. 428.

mortgage.¹ Where a judgmentdebtor with intent to defraud his creditors conveyed property to a third person, on a claim by the purchaser against attachment of that property, the claim was rejected on the ground that the property was in the possession of the claimant in trust for the judgment-debtor.² The plea that the transfer was in fraud of creditors can be raised in defence to an action under rule 63.³ Where property was purchased in the name of the judgment-debtor by the claimant's husband with his money and he and the claimant were in possession of it since the purchase, her claim was upheld.⁴

Claims under these rules are not soley claims for possession.⁵ In *Bhagwan Das v. Baijnath*,⁶ it was said, "The objector may raise an objection to the attachment not only on the ground that he is in possession of it but also on the ground that he has an interest in the property attached and when an executing Court disallows the claim of an objector under section 281 (now rule 61) the Court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection

Order not confined to possession.

1. *Sabapati v. Narayanaswami*, (1901) 25 Mad. 555.

2. *Macintosh v. Bidhu Bhushan*, (1912) 17 I.C. 12 See *Vinayak v. Kaniram*, (1926) Nag. 293.

3. *Ramaswami v. Mallappa*, (1920) 43 Mad. 760 F.B., overruling *Subramania v. Muthia*, (1918) 41 Mad. 612 F.B.

4. *Rangammal v. Sevugan*, (1914) 29 I.C. 228; *Ram Kishun v. Damodar*, (1924) Pat. 506; *Shyam Lal v. Radhe Shyam*, (1923) Oudh 208.

5. *Amrita v. Pandarinath*, (1900) 2 Bom. L.R. 134.

6. (1912) 34 All. 365; *Osman v. Khanoomal*, (1927) 78 I.C. 988; *Allahabad Bank Ltd. v. Meerut*, (1926) All. 244; *Vednath v. Mahomed*, (1934) Rang. 212; *M. D'silva v. Minnie Lal*, (1935) Oat. 267 = 155 I. C. 419; *Masen v. Maung Mya*, (1935) Rang. 161.

on some other ground." In *Najmunessa v. Nacharaddin*,¹ the Calcutta High Court said that rules 60 and 61 provide for a summary investigation into possession as distinct from a thorough trial of the ultimate right; if the judgment-debtor was in possession as agent or trustee of another, that must be considered and to that extent the title may be part of the inquiry in a claim case, but no ultimate questions of trust are intended to be threshed out. In *Ramaswami v. Mallappa*,² a Full Bench of the Madras High Court held that "what is to be investigated at this stage is provided by rules 60 and 61 and is, not the creditor's right to attach, but the question whether the judgment-debtor was in possession (as defined in the rule) of the attached property at the date of the attachment "and the scope of these rules (58 to 63) should be restricted to an inquiry into the question of possession and should not be relied on for investigating titles to property" and if the question of possession is not decided, the High Court can interfere in revision.³ The Court cannot go into the question whether the possession was fraudulent,⁴ or whether the execution is barred by time,⁵ and cannot allow a claim conditional on any payment to the decree-holder

1. (1924) 51 Cal. 548; *N.M.K. Chetty v. Chartered Bank*, (1918) 48 I.C. 182; *Maun Po v. Somasundaram*, (1917) 39 I.C. 275; *Sevuyan v. Rangammal*, (1916) 32 I.C. 34; *Osman v. Khanoomal*, (1927) 98 I.C. 888.

2. *Ramaswami v. Mallappa*, (1920) 43 Mad. 760 F.B., dissenting from *Ramu Aigar v. Palniappa* (1920) 35 Mad. 35; *Arunachalam v. Periasami*, (1921) 44 Mad. 902 (907).

3. *Appaswamy v. Balakrishna*, (1925) Mad. 588=87 I.C. 189. *Proman Singh v. A. T. Wells*, (1923) 1 Ran. 276; *Imam Din v. Mathra Das*, (1931) Lab. 666=132 I. C. 666.

4. *Ho Syew Waihg v. P. R. P. L. Chetty*, (1921) 18 Bur. L.T. 214=64 I.C. 66. See *Jagannatha v. Ganpatrao*, (1933) Nag. 297=146 I. C. G; *Maug Pokyi v. Noor Mahomes*, (1933) Rang. 259.

5. *Hafiz Jaluluddin v. Mt. Maniran*, (1921) 2 Pat. L.T. 275=60 I.C. 375.

on the ground that in the conveyance by which the claimant purchased property, there was an undertaking on his part to pay that sum to the decree-holder as part of the consideration. If the claimant is in possession on his own account under title of a conveyance executed by the judgment-debtor, the claim should be allowed unconditionally.¹ A Judge has no power to try the same objector's claim a second time as against the same attachment or to re-open the question decided on the former occasion.²

Where before the crops were reaped the claimant preferred his claim to a portion of the standing crops and prayed that reaping might be stayed pending the adjudication of his claim or that the crops on his share of the land be kept separate, but the crops were sold and the claim was ultimately allowed, it was held that the claimant was not chargeable with the costs of reaping, as in attaching and selling the crops the decree-holders acted at their own peril and the claimant was not liable to pay those costs either under section 69 or 70 of the Indian Contract Act.³

If a judge is of opinion that the application has been designedly or unnecessarily delayed he may refuse an investigation but if he makes an investigation he is bound to pass an order under rule 60 or 61 and the dismissal of the application on the ground of delay after investigation has been made is illegal.⁴

Dismissal for delay.

1. *Kamalakanta v. Durgakumar*, (1918) 44 I.C. 1007.

2. *Khelut Chunder v. Bhuggobutty*, (1870) 14 W. R. 144.

3. *Rasik Chandra v. Jitendra Kumar*, (1910) 15 C.W.N. 817=8 I.C. 77.

4. *Nga San Balu v. Mi Thaik*, (1916) 2 U.B.R. 136=39 I.C. 345.

Appeal and
revision.

No appeal lies from an order passed on a claim by a person not a party to suit or by a party to a suit applying in a different character to raise the attachment.¹ The order of a Judge sitting on the original side of the High Court on a claim is a 'judgment' within the meaning of S. 15 of the Letters Patent and is appealable.² Where the Court entertains an appeal against an order passed on a claim, the order on appeal is without jurisdiction and where the Court dismissed a claim on the ground that the assignment in favour of the claimant was not recognised by Court that passed the decree, the Court refused to exercise jurisdiction vested in it by law; in these cases, the High Court can interfere in revision.³ Where the lower Court disposed of a claim without deciding questions which under the Code it is bound to decide, for instance, the question of possession in a claim case,⁴ or where the Court disallowed a claim, with a mere remark that the claimant had some sort of interest,⁵ the order was set aside in revision. Where a party has a remedy

1. *Kalicharan v. Banjshi Mohan*, (1872) 6 B.L.R. 727; *Nasibunnissa v. Niazunnissa*, (1886) A.W.N. 39; *Sakharam v. Gadya*, (1898) 2 Bom. L.R. 241; *Dayaram v. Govardhandas*, (1904) 28 Bom. 458; *Raghubar v. Umed*, (1897) 1 O.C. Sup. 11; *Ganga Sahai v. Bapu*, (1894) 8 C.P.L.R. 67.

2. *Sabhapati v. Narayanasami*, (1902) 25 Mad. 555. For an appeal from the original side of the High Court, see also *Venkata Subbiah v. Venugopal*, (1911) 9 M.L.T. 483=9 I.C. 260.

3. *Harischandra v. Shrimati Sashimala*, (1872) 6 B.L.R. 721; *In re J. B. Rainey*, (1869) 12 W.R. 333; *Chillakore Veerra Musula Reddy v. Pattangi Ramayya*, (1909) 4 I.C. 125; *San Tun Pru v. Mi Ani Me*, (1902) 1 L.B.R. 180.

4. *Rangammal v. Sevagan Chetti*, (1915) 28 M.L.J. 327=29 I.C. 228; *Nga Tok v. Subramanian Chetty*, (1910) 1 U.B.R. 75=10 I.C. 994; *San Tun Pru v. Mi Ani Me*, (1902) 1 L.B.R. 180; *Phomon Singh v. A.J. Wells*, (1923) 1 Ran. 276; *Satkar Mandal v. Tirtha Narain*, (1914) 24 I.C. 62.

5. *Mt. Nainu v. Bhupendranath*, (1921) 60 I.C. 616.

by suit the High Court will not interfere in revision,¹ merely on the ground of a misappreciation of evidence or misconstruction of law.² When a claim-petition is dismissed for non-appearance of the claimant, the Court has power to restore it for retrial.³

Unless the order made under rules 60 to 62 is set aside by a regular suit instituted within a year of the date of the order, the party against whom the order is made or his representative in interest is precluded from asserting the right denied to him by the order, as plaintiff or as defendant.⁴

Order conclusive after a year.

Where a claim is allowed and the decree-holder does not get the order set aside by suit within a year, he cannot attach the same property in execution of another decree against the same judgment-debtor,⁵ and the purchaser of that property in execution of that decree cannot succeed in a suit for possession against the claimant or his successor in title,⁶ nor resist the suit of the claimant or his representative.⁷

Where claim is allowed.

Where in execution of a decree for money certain properties were attached and a mortgagee preferred a claim that the properties were subject to his mortgage, and the executing Court directed the sale subject to the mortgage, in a suit by the

1. *Ithacharan v. Velappan*, (1885) 8 Mad. 484; *Guise v. Jaisraj*, (1893) 15 All. 405; *Bhairan v. Rajanta*, (1917) 38 I.C. 299.

2. *Maung San v. Maung Lun*, U.B.R. (1917) 2nd Qr 13.

3. *Ramappa Chettiar v. Ekambara Paṇḍayachi*, (1921) 47 M.L.J. 13.

4. *Badri Prasad v. Muhammad Yusuf*, (1878) 1 All. 381 F.B.; *Bibi Aliman v. Dhakeswar*, (1900) 1 C.L.J. 296; *Gayadin v. Baijnath*, (1908) 11 O.C. 180; *Haripada v. Surendranath*, (1922) Cal. 164.

5. *Mt. Niamat-un-nissa v. Raza Ali*, (1910) 8 O.C. 306.

6. *Rajaram v. Raghubans*, (1897) 24 Cal. 563; *Jiwani v. Nathumal*, (1910) P.R. 28=5 I.C. 890. See also *Sardhari Lal v. Ambika Prasad*, (1888) 15 Cal. 521 P.C.

7. *Rama Iyyer v. Palaniappa*, (1910) 8 M.L.T. 381=8 I.C. 117.

mortgagee against the purchaser in execution, it was held that the order upholding the mortgagee's claim in execution proceedings was conclusive and that the purchaser could not plead that the mortgage was without consideration and was not properly attested.¹

An attaching creditor, against whom an order was made allowing the claim of a mortgagee is concluded by the order unless set aside by suit in a year. Where therefore the mortgagor filed a suit on his mortgage, an assignee of the attaching creditor, who purchased the property later in execution of his decree cannot impeach the mortgage on the grounds urged by his assignor in the claim-proceedings. It was said that the fact that the assignor became the representative of the judgment-debtor who was no party to the claim-proceedings did not override the estoppel or relieve against the disability imposed by the Code.² Where two decrees in favour of one decree-holder were in execution against the same judgment-debtor and the objection of the mortgagee was allowed as regards the second decree while it related to the first, and no regular suit was brought within one year against the mortgagee, the order allowing the objection was operative against both the decrees (whether absolutely final or not) as long as it stands and the decree-holder was debarred from maintaining a regular suit subsequently brought by him to impugn the validity of the second order passed in favour of the mortgagor allowing his objection again on the occasion of re-attachment of the mortgaged property in execution of the first decree.³

1. *Govind v. Dheklur*, (1923) 19 N.I.R. 15.

2. *Ramu Aiyar v. Palaniappa Chetty*, (1910) 35 Mad. 35.

3. *Ramdas v. Mulchand*, (1909) 1 F.I.R. 82 = 43 I.C. 970.

Where a claim is disallowed and no suit is instituted within a year to set aside that order, the claimant or his representative can neither institute a suit afterwards against decree-holder,¹ or attaching creditor,² or the purchaser for possession,³ nor resist a suit by the auction-purchaser or his representative for declaration or possession.⁴ When the purchaser of the property at a sale held after the dismissal of claim applied for delivery, the claimant ought not to be allowed to obstruct the delivery.⁵

Where claim is disallowed.

In *Singariah Chetty v. Chinnabbi*,⁶ the 9th defendant brought a suit against defendants 1 and 2 and effected an attachment before judgment of the immovable property in the suit. The plaintiffs

1. *Rahim Bux v. Abdul Kader*, (1904) 32 Cal. 537; *Bailur Krishna v. Lakshmana*, (1870) 4 Mad. 307; *Venkappa v. Chenbappa*, (1880) 4 Bom. 21; *Krishnaji v. Bhaskar*, (1880) 4 Bom. 611; *Kamalattanni v. Ranga Iyengar*, (1897) 7 M.L.J. 310; *Bhimappa v. Irappa*, (1902) 26 Bom. 146; *Rajaram v. Musammal Umdan*, (1913) P.L.R. 179=18 I.C. 519; *Muhammed v. Ayyappan*, (1897) 9 M.L.J. 131.

2. *Jeoni v. Bhagwan*, (1878) 1 All. 541.

3. *Himayat Ali v. Mansukh*, (1883) A.W.N. 19; *Keshab Lal v. Ram Lochan*, (1890) 17 Cal. 260; *Achuta v. Mammou*, (1887) 10 Mad. 557; *Singariah Chetty v. Chinnabbi*, (1921) 44 Mad. 268.

4. *Ram Dayal v. Durga Dai*, (1884), A.W.N. 25; *Basant v. Kananji*, (1879) 2 All. 455; *Nemagauda v. Paresha*, (1898) 22 Bom. 640; *Badri Prasad v. Muhammad*, (1878) 1 All. 381 F.B.; *Nilo v. Rama*, (1885) 9 Bom. 35; *Tayabali v. Atmaram*, (1914) 38 Bom. 631; *Velayuthan v. Lakshmana*, (1885) 8 Mad. 506; *Surnamoyi v. Ashutosh*, (1900) 27 Cal. 714; *Mahomed v. Ayyappen*, (1898) 9 M.L.J. 131; *Ramu Iyer v. Palaniappa Chetty*, (1910) 35 Mad. 35; *Peela Varakayya v. Venkata*, (1917) 22 M.L.T. 232=41 I.C. 684.

5. *Jugal Kishore v. Bejoy Kishna*, (1912) 16 C.W.N. 882=15 I.C. 683.

6. (1921) 44 Mad. 268. The dismissal of a claim petition followed by the dismissal of the suit brought to set aside the order on the claim petition has the effect of conclusively settling the question between the parties not merely as regards the suit out of which the decision arose but also in all proceedings between the same parties.

claiming to be the mortgagees of the property preferred a claim and that was dismissed. Then they brought a suit to set aside the order of dismissal and the suit was also dismissed. Subsequently the 5th defendant in execution of a decree which he obtained later in another suit against defendants 1 and 2 attached the same property and brought it to sale and defendants 3 and 4 became the purchasers. In a suit by the plaintiffs to enforce their mortgage against defendants 3 and 4 and the other defendants more than one year from the order on the claim petition in the first suit, it was held that the order on the claim petition was conclusive under Order 21 rule 63 and the plaintiffs were precluded from instituting the suit on their mortgage.

Where the defendant did not file a regular suit to set aside an order disallowing his claim to the suit property within one year from the date of such order as required but subsequently trespassed upon the property and dispossessed the plaintiff, it was held that the order on the claim petition and the questions of title had become conclusive and could not be re-opened as no independent suit was brought by the unsuccessful claimant (defendant in the case) within one year and the written statement in the present suit could not have the effect of such a regular suit though it may have been put in within the prescribed period of one year.¹

Rule
applicable to
attachment
of debt.

The procedure laid down in these rules applies to a debt attached in execution of a decree, and an order made against the alleged debtor is binding upon him if he does not institute a suit for a declaration that no debt was due from him, with-

1. *Peela Yarakaya v. Venkatakrishnamraju*, (1917) M.W.N. 721=41 I.C. 684.

in a year from the date of the order passed against him.¹ Where a garnishee prefers a claim to set off some amount due to him from the judgment-debtor and the claim is disallowed, he is debarred from setting up the same plea in a suit by the auction-purchaser of the debt to recover the debt from him, if he does not get his right of set-off established by a regular suit within a year.² In execution of a decree against a judgment-debtor a debt alleged to be due to him by a third person was attached and the garnishee objected to the attachment stating that no debt was due to the judgment-debtor. The Court on enquiry confirmed the attachment, and the garnishee did not take any steps to challenge the validity of the order. The decree-holder purchased the debt in court-sale and brought a suit to recover the debt. It was held that it was not open to the debtor to contend that there was no debt due by him to the judgment-debtor and that the order in the previous execution-proceedings was final.³

Under the Code of 1882, it was thought that these provisions contemplated an investigation of the claim regularly and on the merits and unless an order was made on such investigation, it would not be conclusive against the party in the matter, and there was no need to set it aside by suit brought within a year.⁴ So it was held, for instance, when the claim had been withdrawn⁵ or was com-

Investigation
under C. P.
Code, 1882.

1. *Piara Ram v. Ganga Ram*, (1923) 71 I.C. 45.

2. *Tayabali v. Almaram*, (1914) 38 Bom 631.

3. *Subbier v. Moideen Pichai*, (1923) 44 M.L.J. 588=72 I.C. 558.

4. *Chandra Bhusan v. Ramkanth*, (1885) 12 Cal. 108.

5. *Munisami Reddi v. Arunachala Reddi*, (1894) 18 Mad. 265 ; *Rura Mal v. Kuria*, (1894) P.R. 62. It could not then be revived, *Gooroo Das v. Kamal Kant*, (1873) 20 W.R. 456.

promised¹ or was dismissed for default² or on the ground of delay³ or on the ground that the section did not apply,⁴ or when the Court refused to inquire into the claim on the ground that there was nothing to show the identity of the property attached with that claimed,⁵ or where the order was merely an endorsement on the record that the applicant did not want to proceed further,⁶ or where the order was that to enter into evidence would lead to adjudication of complicated questions of fact which would not after all be easy and convenient to try summarily.⁷

Change in the law.

Under section 283 of the C. P. Code of 1882, "the party against whom an order *under sections 280, 281, 282*, (now rules 60, 61 and 62) *is passed* may institute a suit ..." Under Order 21 rule 63 of the C. P. Code of 1908, "the party against whom *an order is made* may institute a suit." So under the Limitation Act of 1877, the suit covered by Article 11 was "By a person against whom an order is passed under sections 281, 282, or 335, Civil Procedure Code, to establish his right...." Under the Limitation Act of 1908, the suit contemplated by Article 11 is by a person against whom an order under the Code of Civil Procedure, 1908, on

1. *Panchu Muchi v. Bhuto Muchi*, (1919) 50 I.C. 649.

2. *Kallar Singh v. Toril Mahton*, (1895) 1 C.W.N. 24; *Sajan Ram v. Ram Rattan*, (1904) P.R. 87; *Kallu Mal v. Brown*, (1880) 3 All. 504. See also *Sarala Subba Rau v. Kamsala Timmayya*, (1908) 31 Mad. 5; *Kunj Behari Lal v. Kandh Prashad*, (1907) 6 C.L.J. 362; *Alwar Iyengar v. Zelleveger*, (1899) 9 M.L.J. 175 (177); *Sarat Chandra v. Tarini Prasad*, (1907) 34 Cal. 491.

3. *Venkappa v. Chenbasappa*, (1880) 4 Bom. 21.

4. *Radharath v. Jadoonath*, (1867) 7 W.R. 441.

5. *Chandra Bhusan v. Ramakanth*, (1885) 12 Cal. 108; *Pulamma v. Pradosham*, (1895) 18 Mad. 316.

6. *Bhikka v. Sakarlal*, (1881) 5 Bom. 440.

7. *Rash Behari v. Budden Chunder*, (1883) 12 C.L.R. 550.

a claim preferred to or an objection made to the attachment of, property attached in execution of a decree " has been made. On a comparison of these provisions, it has been held that the provisions of the Act of 1908 are wider in their scope than those of the Act which they repealed and consequently that under the new Act, any order made under rules 60, 61 and 62, be it after investigation or not, will become final unless set aside by a regular suit within a year.¹

The order is operative if there has been some investigation whether perfunctory or satisfactory. For example, an order passed to the effect that a deed produced by a claimant or objector is not genuine, although it is based upon the mere examination of the deed, without a fair opportunity of proving it having been given to the claimant, is nevertheless an operative order.²

Investigation need not be regular.

A dismissal of a claim for failure to produce evidence is an order passed on investigation.³ So

1. *Narasimha v. Vijiappa*, (1914) 2 L.W. 206=27 I.C. 944 ; *Subba Iyer v. Subba Iyer*, (1915) 31 I.C. 250; *Jugal Kishore v. Bejoy Krishna*, (1912) 16 C.W.N. 882=15 I.C. 683; *Nagendra v. Fani Bhushan*, (1918) 45 Cal. 785 ; *Gobherdhan Das v. Mukundi Lal*, (1923) 45 All. 438 ; *Ponnusami v. Sami Ammal*, (1916) 31 M.L.J. 247=38 I.C. 937 ; *Saiyud Raziuddin v. Bindesri Prasad*, (1920) 5 Pat. L.J. 652=58 I.C. 37. In *Nandlal v. Naresachandra*, (1917) 2 Pat. L.W. 108=41 I.C. 468 and *Panchu Muchi v. Bhuto Muchi*, (1919) 50 I.C. 649, when the contrary opinion was held, the order was passed under the C. P. Code of 1882. In *Muhammad Bakhsh v. Balkishan*, (1915) P.W.R. 72=29 I.C. 731 ; and *Nanhu v. Malloo*, (1919) 44 I.C. 528, in Nagpur though the order was passed in 1909, the change in the language of the Code of 1908 was overlooked. See on the merit of this view an article in 23 C.W.N. 50.

2. *Bal Makund v. Maqsud Ali*, (1917) 19 O.C. 357=37 I.C. 92.

3. *Sudarsandas v. Ram Prasad*, (1911) 10 I.C. 402 ; *Venkatachelapati v. Virasami*, (1915) 17 M.L.T. 223=28 I.C. 244 ; *Jiwani v. Nathumal*, (1910) P.R. 28=5 I.C. 890; *Gopal Singh v. Ganpatrai*, (1916) P.R. 66; see also *Gooroo Dess v. Sona Monee*, (1873) 20 W.R.

is a dismissal for default,¹ or for want of prosecution,² or an order refusing to investigate a claim.³

Where the order on a claim petition was that the allegation of the claimant will be notified to the bidders, the order is one made against the claimant and amounts to a rejection of his claim.

Venkataratnam v. Ranganayakamma.

In *Venkataratnam v. Ranganayakamma*,⁴ Wallis C.J., said "The general policy of these provisions of the Code, as explained by the Judicial Committee in *Sardhari Lal v. Ambika Pershad*,⁵ is to secure the speedy settlement of questions of title raised at execution sales. Section 283 of the Codes of 1877 and 1882 only gave a right of suit to the party against whom an order had been passed under sections 280, 281 or 282, and did not provide for the case where the Court under section 278 refused to investigate the claim on the ground that it had been designedly or unnecessarily delayed. In such cases, section 283 failed to provide for the speedy settlement of the questions of title raised by the claim. The legislature would appear to have in-

345; *Srimunto Hajrah v. Tajodeen*, (1874) 21 W.R. 409; *Kaminee Debia v. Issur Chander*, (1824) 22 W.R. 39; *Karsan v. Ganpatram*, (1891) 22 Bom. 875; *Rahim Bux v. Abdul Kader*, (1904) 32 Cal. 537; *Koyyina Chittamma v. Doosy Gavaramma*, (1906) 29 Mad. 225; *Lachmi Narain v. Martindell*, (1897) 19 All. 253 F.B.

1. *Nagendra v. Fani Bhushan*, (1918) 45 Cal. 788; *Gopal Singh v. Ganpatrai*, (1916) P.R. 66; *Ponnusami v. Samuammal*, (1916) 31 M.L.J. 247 = 38 I.C. 937; see also *Tripoora Soonduree v. Ijatoonnissa*, (1875) 24 W.R. 411; *Bibi Aliman v. Dakeseshwar Prasad*, (1904) 1 C.L.J. 296.

2. *Gulab v. Mutsaddi Lal*, (1919) 41 All. 632; *Gayadin v. Baijnath*, (1908) 11 O.C. 180; *Bal Makund v. Maqsud Ali*, (1917) 19 O.C. 357 = 37 I.C. 92. But see contra *Gokul v. Mohri*, (1918) 40 All. 325.

3. *Machiraju v. Sri Rajah Ranganayakamma*, (1915) 41 Mad. 985 F.B.

4. (1918) 41 Mad. 935 F.B.

5. (1888) 15 Cal. 521 (525) P.C.

tended to supply this omission when in rule 63 of Order XXI of the present Code it conferred the right of suit in general terms "where a claim or an objection is preferred" upon "the party against whom an order is made," instead of limiting it, as in section 283, to cases in which an order had been passed under rules 60, 61 and 62 (sections 280, 281 and 282 of the old Code). Where a claim or objection is preferred under rule 58 (formerly section 278), and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the unsuccessful claimant or objector in my opinion clearly comes within the words 'the party against whom the order is made.' Rule 63 does not speak of any party but of the party against whom an order has been made and assumes that, where a claim or objection is preferred under rule 58 (section 278), there must always be a party against whom an order is made within the meaning of the rule."

Where a person objects to the attachment of the property and files a petition asking that his objections be recorded without asking for an investigation of his claim, and the Court records his objections, such recording of objections does not amount to an order against the objector to which the provisions of rule 63 would apply.¹ Where a claim petition is withdrawn the order must be to record the withdrawal and not to dismiss it and such order is not conclusive.² Where the Court said "The claim cannot be investigated by this Court," and that the Court having jurisdiction to investigate the claim was the sub-court, and dismissed the petition, Spencer J.

Instances of
inconclusive
orders.

1. *Ayya Pattar v. Attupurath Manakkal*, (1919) M.W.N. 805 = 52 I.C. 938. See *Bhikka v. Sakarlal*, (1881) 5 Bom. 440.

2. *Gade Lakshmiarasamma v. Narugotla Pydanna*, (1924) 80 I.C. 233.

said that the order was not passed under Order 21, C. P. Code at all which relates to investigation of claims but in the course of execution ; " It did not negative the right set up by the claimant but it was an order declining to adjudicate either for or against him ; and upon the substance of the claim, it cannot be treated as an order more against him than against the decree-holder."¹

In *Abdul Kadir Sahib v. Somasundaran Chettyar*,² property mortgaged to the plaintiff was attached and brought to sale in execution by the defendant. On the day fixed for the sale, the plaintiff preferred a claim petition that the sale proceeds should be kept in deposit in Court to satisfy his mortgage and not be paid over to the defendant. The Court dismissed the application holding that as the sale had taken place it had no jurisdiction to hear the petition. In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant the latter pleaded that the suit was barred by Arts. 11 and 62 of the Limitation Act. It was held that there was no order negating the claim of the plaintiff and his suit was not therefore barred by Art. 62 of the Limitation Act, and that the suit was one to enforce a mortgage and was governed by Art. 132 and not by Art. 62 of the Limitation Act though the mortgaged property had been converted into money as a result of the court sale. When the claim was disposed of by an order " Whatever right the defendant has will pass by the sale. The petition does not require any further investigation. The claim put forward by the petitioner will be noted in the sale proclamation." The sale

1. *Lakshmi Ammal v. Kadiesan Chettiar*, (1921) 41 M.L.J. 198=63 I.C. 431.

2. (1923) 70 I. C. 648, *per* Schwabe C. J. on a difference of opinion between Spencer and Krishnan JJ.

was held and the decree-holder himself became the purchaser. In a suit brought by the plaintiff for the recovery of his half share of the property from the decree-holder purchaser it was held that the order on the claim petition was an improper one ; that it was not, however an order against the claimant (plaintiff) within the meaning of O. 21, r. 60, C.P.C., and the suit instituted more than a year from the date thereof was not barred under Article 11 of the Limitation Act.¹

Where by an order on a claim petition, the purchase made by a decree-holder of his judgment-debtor's property at court sale was made subject to a mortgage lien, and some years later when the mortgagee sued to enforce his mortgage the purchaser (defendant) objected that the mortgage was fraudulent, it was held that the order recognising the mortgage would be conclusive against the defendant only if it was found that he was aware of the fraud within a year from the date of the order and being so aware did not take steps to have it vacated within the time limited by Art. 11 of the Limitation Act by a regular suit. If however the defendant became aware of the fraud after the period, he could under section 44 of the Indian Evidence Act, assert the fraudulent nature of the plaintiff's application and the consequent invalidity of the Court's order under Order 21 rule 63 in any proceeding instituted by the mortgagee on the strength of such order.²

Where on a claim petition being dismissed, the objector whose title was negatived institutes a suit against his vendor for return of money for failure

1. *Kachinamthodi Parambil Saharabi v. Kachinamthodi Puthia Purayil Sreemamutti*, (1923) 44 M.L.J. 141=72 I.C. 857

2. *Chinna Sadashiv v. Ram Dayal*, (1914) 16 Bom. L.R. 648 =27 I.C. 238.

of consideration, Order 21, rule 63 does not apply and the suit need not be brought within one year.¹

Order benefits
only the
particular
decree-holder.

The order however operates only in favour of the particular decree-holder in whose favour the order was made and his representatives and other decree-holders against the same judgment-debtor cannot take benefit under it. J brought a suit for a declaration that certain property he alleged he had purchased from S belonged to him and was not liable for attachment in execution of a decree against that S. In another proceeding between this plaintiff and another decree-holder, there was an attachment of this property and the plaintiff's claim was dismissed: It was said "The order is final only as between the parties to the application in which the order is made and their representatives. An order in favour of a decree-holder on an objection under section 278 (now rule 58) does not enure for the benefit of the other decree-holders who are not parties to the proceedings. The District Judge appears to have thought that a decree-holder who obtains an order in his favour under these sections may be treated as representing all the other decree-holders holding decrees against the judgment-debtor and seeking to sell the same property. This is not the case of an order having been made in favour of a decree-holder at a time when several other decree-holders had obtained attachment of the same property. We say nothing as to what might be the effect of the order under sections 280 or 281 or 282 in favour of one decree-holder so far as the other decree-holders were concerned who had obtained attachment."²

1. *Rati Ram v. Burhmajit*, (1923) 21 A.L.J. 770.

2. *Jagannath v. Ganesh*, (1896) 18 All. 413. See *Vadapali Narasimham v. Dronamraju Seetharamamurthy*, (1901) 31 Mad. 163.

The order is only conclusive in respect of the property dealt with by the order. In *Dinkar v. Hari Sridhar*,¹ the plaintiff purchased two plots of land A and B by a deed of sale in 1875 from G. In execution of a decree against G, plot A was attached and sold as his property and purchased by the defendant. The plaintiff did not intervene. In 1885, the defendant obtained another decree against G and attached plot B. Then the plaintiff intervened and his claim was allowed. The defendant did not sue to set aside that order. The plaintiff sued to establish his title to plot A, relying on his sale deed of December 1875. It was argued for the plaintiff that the validity of the sale deed was thus put in question in the claim proceeding and was upheld and that no suit having been brought in one year, it was too late to question it.

Order
conclusive
only in
respect of the
particular
property.

The Judge said "No doubt the evidence used by the plaintiff in both cases is the same, viz., the deed of sale. But the title to the entire property was not in question. The land formerly in dispute may have been so small as not to justify further litigation. The land now in dispute is considerable in extent and value. The question of title to the one may not have been worth the fighting. Does acquiescence in the decision regarding the one preclude any question as regard the other? It cannot have been the intention of the Legislature, which excludes all other property from the operation of this article to prevent the title to it being litigated at all in future, merely because the title to it has been incidentally or rather inferentially dealt with, because it happened to be included

1. (1889) 14 Bom. 206 ; *Radha Prasad v. Lal Sahib*, (1890) 13 All. 53 P.C. ; *Asna Bibi v. Jaigummissa Bibi*, (1917) 44 Cal. 698,

in a document which was the foundation to the title of the property in dispute. For, as section 283 does not allow the remedy by suit to be brought within one year except as regards the property in dispute in the execution of decree, the rule of *res judicata*, if applied to the other property, would prevent any suit being brought about it at all. But it would be absurd to allow by express words fresh litigation about the property formally adjudicated in the execution matter, and by a jural rule to prohibit any direct trial of the right to the other property about which there has been no formal litigation, perhaps no dispute. This consideration is still more important, as in many cases, before formal suit is brought and the other property valued, it is impossible to know whether the Court executing the decree is competent to adjudicate on the other property."

After-acquired
rights left
unaffected.

But an unsuccessful claimant, if he acquires *other* rights in the property *after* the adverse order, is not precluded from asserting *those rights*, even though he may not have sued within a year. In *Nilo Pandurang v. Rama Patloji*,¹ the property belonging to B but in the possession of a usufructuary mortgagee was sold and purchased by the plaintiff in 1873. In the attachment in execution, C intervened as the vendee from B under a sale deed of 1872, but the claim was dismissed. C paid off the mortgage subsequently and obtained possession, but did not bring any suit to set aside that order in one year. In a suit for possession by the plaintiff it was said that the failure to bring a suit concluded C, but "it would be contrary to equity, justice and good conscience, were the Court to assist the plain-

1. (1884) 9 Bom. 35. See *Ramu Aiyar v. Palaniappa Chetty*, (1910) 35 Mad. 35.

tiff in obtaining possession without paying the defendants what they have paid to the mortgagee to free the property from the incumbrance and to recover possession of it from the mortgagor."

The order for release of attached property has reference only to the claimant who has obtained it and it has not the effect of a general decision that the property does not belong to the judgment-debtor.¹ Order does not generally affect judgment-debtor.

In *Sardhari Lal v. Ambika Pershad*,² the Privy Council indicated that besides the claimant, the only other party within the meaning of Section 280 (now rule 60) is the judgment-creditor. In *Kedarnath v. Rakhaladas*,³ the proposition was laid down that in proceedings under section 278 (now rule 58) the real question for decision is not whether the title to the property belongs to the judgment debtor or the claimant but whether the property should be released from attachment or not. In that case G in execution of a decree, attached certain immoveable property belonging to the plaintiff, whereupon B preferred a claim, and on the 10th March 1881 got the attachment removed. On the 20th July 1881 B sold the property to K. In 1882 G instituted a suit against B to set aside the order of the 10th March 1881, and to have it declared that the property was liable to attachment as belonging to the plaintiff. K was not made a party to that suit, and it was eventually compromised

1. *Imam Bundee v. Mirja*, (1867) 8. W. R. 27.

2. (1888) 15 Cal. 521 P.C.; *Sadaya Pillai v. Amurthathachy*, (1910) 34 Mad. 534.

3. (1888) 15 Cal. 674; *Morshia Burayal v. Elahi Bux Khan*, (1905) 3 C.L.J. 381. See also *Sadaya Pillai v. Amurthathachy*, (1910) 34 Mad. 534; *Bukshi Ram v. Sheo Pergash*, (1885) 12 Cal. 453.

between G and B, the plaintiff's title being admitted. G thereupon again attached the property, and was met by a claim preferred by K, which was allowed on the 15th August 1883. G then brought another suit against K to obtain relief similar to that claimed in his suit against B, but his suit was dismissed on the 17th February 1885. On the 25th September 1885 the plaintiff instituted a suit against G, B and K, to obtain a declaration of his title and to recover possession of the property. It was contended that the suit was barred by limitation, being governed by Art. 11, Sch. II of Act XV of 1877, in as much as it was brought more than one year after the date of the order of the 15th August 1883. It was held that no order was really made against the plaintiff under section 280 (now rule 60) and the suit was not governed by Article 11 of the Limitation Act. Beverley J. said "When a claim is preferred to property which has been attached as the property of the judgment-debtor, the contest is really between the decree-holder who asserts that the property is liable to attachment, and the claimant who alleges that it is not in the actual or constructive possession of the judgment-debtor, and therefore not liable to attachment. And the order made in such a case is either that the property be released from attachment as not being in the possession of the judgment-debtor (S. 280) or that the claim be disallowed, the property being found liable to attachment (S. 281). In a sense the order in either case may be said to be against the judgment-debtor; in the one case it declares that the property is not in his possession; in the other it declares that it is liable to attachment and sale. But in either case does it affect his right or title to the

property, and in point of fact it is an order to which he need be no party, as it may be made behind his back. Then, if we turn to S. 283, we see that the suit there referred to is a suit to establish the right which is claimed in those proceedings, being on the one hand the right to have the property attached and sold in execution and on the other the right to have it released from attachment. The words of the section are not "the right to the property," meaning the title to the property, but "the right which he claims to the property" which, we take it, means "the right which is claimed in that proceeding in respect of the property"—that is, as we have said, the right to have it sold or the right to have it released from attachment. That this is so is clear, we think, from the fact that the decree-holder has no right or title in the property attached, and could not sue to establish any such right. What he claims and what he may sue to establish is the right to have the property declared to be liable to attachment and sale in execution of his decree."

But the view has been taken, almost always, that the proceedings may be such that the judgment-debtor may be bound by the order, so as to make it conclusive against him, in the same manner as against the claimant or the attaching creditor.¹

But judgment-debtor may be bound by the order.

Whether the judgment-debtor is to be regarded as having been a party to the investigation or not must depend on the facts of each case.² An order made on a claim is not conclusive against or in

1. See *Netieton Perengaryrom v. Tayanbarry Parameshwaran*, (1869) 4 M.H.C. R. 472 F.B.

2. *Shivappa v. Dod Nagaya*, (1886) 11 Bom. 114; *Ajibal Narasimha v. Shirekoli Timapa*, (1892) 17 Bom. 629; *Anant Ram v. Damodar Das*, (1914) P.L.R. 102=22 I.C. 797.

favour of the judgment-debtor under Order 21 rule 63 C. P. Code, unless the judgment-debtor was a party to the proceedings in which the order was passed.¹

*Moidin Kutti
v. Kunhi
Kutti.*

If the judgment-debtor was not a party to the order on the claim, a suit by him or against him would not be governed by Art. 11 of the Limitation Act.² In *Moidin Kutti v. Kunhi Kutti*,³ the plaintiff sued to recover possession of immoveable property. The land in question had, on a previous occasion, been attached in execution of a decree against the plaintiff, whereupon his younger brother, the present second defendant, had preferred a claim on which an order was passed holding that the plaintiff (then judgment debtor) and second defendant (then claimant) were jointly entitled to the land. The claim was held to be good to the extent of a moiety of the land, which was accordingly released from attachment, the other moiety being ordered to be sold, the claimant's claim thereto being rejected. The plaintiff satisfied the decree and the property was not sold. He now sued to recover possession of it. It was held that, having regard to the terms of the order in the claim proceedings and to the fact that it had not been proved that plaintiff had actually received notice of them the plaintiff was not a party

1. *Anant Ram v. Damodar Das*, (1914) P.L.R. 102=22 I.C. 797.

2. *Cheriyarakel v. Vayaka Parambath Imbichi Ammah*, (1871) 6 M.H.C.R. 416; *Imbichi Koya v. Kakkunnat Upakki*, (1878) 1 Mad. 391; *Nitta Kolita v. Bishnuram*, (1869) 2 B.L.R. Ap. 49; *Mannu Lal v. Harsukh Das*, (1880) 3 All. 233; *Shivappa v. Dod Nagaya*, (1886) 11 Bom. 114. In most of these cases the correctness of the decision in 4 M.H.C.R. 472 F.B. was doubted and not followed. See also *Karsan v. Ganpatram*, (1897) 22 Bom. 875; *Krishnasami v. Somasundaram*, (1906) 30 Mad. 535 F.B.

3. (1902) 25 Mad. 172.

against whom an order had been made, within the meaning of section 283 of the Code of Civil Procedure, and that the order was not conclusive as against him.

In *Vadapalli Narasimham v. Dronamraju Seetharamamurthy*,¹ the facts were these. "In 1884 Sanyasi, the father of defendants Nos. 2 to 6, obtained possession of the lands under a kadapa or lease agreement executed in favour of the predecessors in title of defendants Nos. 8 and 9 for a period of three years. Sanyasi paid rent till 1887, but, after that date he, and after his death defendants Nos. 2 to 6, and from 1899 the first defendant after sale from defendants Nos. 2 to 6 successively remained in possession for more than 12 years without paying any rent. In 1896 the plaint lands were attached in execution of a decree against defendants Nos. 8 and 9. The defendants Nos. 2 to 6 put in a claim petition claiming the lands as their own, but the claim was disallowed on 31st July 1898. Defendants Nos. 2 to 6 did not bring a suit under section 283 of the Code of Civil Procedure, but they continued in possession." It was held that the defendants 8 and 9 were not parties to the claim proceeding and that the order did not enure for their benefit, and the plaintiff's suit was not barred.

In *Shivapa v. Dod Nagaya*,² the Karwar Company had obtained a decree against the plaintiff, Nagaya, and, in execution, had attached the house in question. The defendant, Shivapa, intervened in 1878, under section 246 of the C.P. Code of 1859, alleging that he had purchased the house from Nagaya

1. (1907) 31 Mad. 163; *Ramu Aiyar v. Palniappa Chetty*, (1910) 35 Mad. 35.

2. (1886) 11 Bom. 114.

and obtained an order removing the attachment. The Karwar Company then brought Suit No. 886 of 1879 against Shivapa, praying for a declaration that the house belonged to Nagaya, and was liable to sale. The Subordinate Judge having found Shivapa's document of sale proved, and neither the plaintiff nor his witnesses appearing afterwards, and nothing being done in the suit, dismissed the suit. "It has been contended that the dismissal of that suit operates as *res judicata* in the present suit by the judgment-debtor to recover possession of the property. The District Judge confirming the Subordinate Judge, held that the suit was not barred under section 13 of the Civil Procedure Code. There is some conflict of authority as to whether the judgment-debtor is bound by proceedings under section 246 of the Civil Procedure Code of 1859. In the case of *Babaji Vithal Savant v. Kaji Abdul Rahiman*,¹ decided by Melvill and West JJ., it was held that the intention of the law was that an attaching creditor proceeding under section 246 of the Code of Civil Procedure of 1859 should be held to represent the judgment-debtor's interest, and that the judgment-debtor was consequently bound by an order made under that section. We have not found any other authority for this particular view of the section. In *Netieton Perengaryprom v. Tayanbarry Parameshwaren*,² the Madras High Court, with an expression of doubt by Mr. Justice Innes, held that the judgment-debtor must be deemed to have been a party to the investigation, and, therefore, to be bound by the order, on the ground that the section provides that the Court

1. (1873) B.P.J. 159.

2. (1869) 4 M.H.C. R., 472.

is to proceed as if the claimant had been originally made a party to the suit. However, great doubt was thrown on this last decision by Morgan C.J., and Holloway, J., in *Cheriyarakel v. Vayka Parambath Imbichi Ammah*.¹ They say: "We should, but for the case referred to, have had great difficulty in saying that the judgment-debtor was a party to the order at all; but we think this case may be decided without touching the ground of that decision." Again in *Imbichi Koya v. Kakkunnat Upakki*,² the Madras High Court consisting of Morgan, C J. and Innes, J., says: "The proceeding under that section is apparently regarded by the Subordinate Judge as a proceeding which must necessarily include the judgment-debtor. But this is not so. The material fact for inquiry is, whether the claimant held possession, and the fact of possession may be investigated in a proceeding between the decree-holder and claimant only. The power given by the section to summon the original defendant also shows this." In that case the evidence showed that the judgment-debtor was, as a matter of fact, in foreign parts at the time, and had no notice or knowledge of the proceeding under the section. The decision in *Manu Lal v. Harsukh Das*³ is to the same effect. These are all decisions under section 246 of the Code of 1859. The corresponding section 278 of the present Code does not provide expressly for the judgment-debtor being summoned, but directs the Court 'to proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit.' This expression, in somewhat

1. (1871) 6 M.H.C. R. 419.

2. (1878) 1 Mad. 393.

3. (1880) 3 All. 233.

clearer language than section 246 of the Code of 1859, shows the intention of the Legislature, that the investigation is to be conducted as one arising in the suit to which this claimant is for the nonce to be regarded as a party, but otherwise it leaves the legal aspect of the question under consideration unchanged. Now, doubtless, the judgment-creditor litigates, both in the investigation under section 278 and in the suit contemplated by section 283, under the judgment-debtor's title; but we think there is great difficulty in holding that he represents the latter in those proceedings on the proper construction of the above sections. The circumstance that the judgment-creditor in most cases is ignorant of the judgment-debtor's affairs, and unfit to represent him in a question of disputed right between him and the claimant, forbids the supposition, in the absence of clear words, that this was the intention of the Legislature. The contrary intention is rather to be inferred from the provisions contained in the sections of both the Codes under consideration for the investigation proceeding as if the claimant was a party to the suit, the object of which would seem to be that the matter should be investigated in the presence both of the judgment-debtor and claimant if necessary. We think, therefore, that the lower Courts were right in holding that the decree in Suit 886 of 1879 did not operate as *res judicata*, there being no evidence to show that the judgment-creditor, in point of fact, represented the plaintiff so as to constitute the judgment-debtor a party to the suit."

When in proceedings on a claim the judgment-debtor has not appeared and there has been no adjudication between him and the claimant, Article

11 of the Limitation Act will not apply to a suit brought by the defeated claimant to establish his right against the judgment-debtor. In *Sadaya Pillai v. Amurthathachy*,¹ a claim on a usufructuary mortgage was disallowed, but the judgment debt had been satisfied within a year otherwise than by sale of the property. The claimant then sued to establish his right as usufructuary mortgagee and to recover possession. It was held that the order on the claim did not enure to the benefit of the judgment-debtor, because she "neither appeared nor was there adjudication of the claim as between her and the present plaintiff."

Where judgment-debtor not a party to the proceedings.

But if the judgment-debtor had been made a party to the proceedings and there was an adjudication between him and the claimant, the suit of the claimant would be barred as against him if not brought within a year and *vice versa*.²

Where judgment-debtor is a party to the proceedings.

To conclude the judgment-debtor, the order on the claim must have not merely been on notice to him, but must have decided the title as between her and the claimant.

In *Guruva v. Subbarayudu*³ A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree

1. (1910) 34 Mad. 533.

2. *Moidin Kutti v. Kunhi Kutti*, (1902) 25 Mad. 721; *Anant Ram v. Damodar Das*, (1914) P.L.R. 102=22 I.C. 797. See also *Koyyana Chittemma v. Doosy Gavaramma*, (1906) 29 Mad. 225.

3. (1890) 13 Mad. 366. See also *Moidin Kutti v. Kunhi Kutti*, (1902) 25 Mad. 721; *Sadayapillai v. Amurthathachi*, (1910) 34 Mad. 532.

appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house: It was held that since there was nothing to show that the order releasing the attachment was an order against the plaintiff the suit was not barred by limitation. Their Lordships said "Whether the present plaintiff is barred by Article 11 of schedule II of the Limitation Act depends upon whether he was the party against whom the order allowing the present second defendant's claim was made within the meaning of section 283 of the Civil Procedure Code. It is contended that he was so, on the authority of the Full Bench decision of this Court in *Netietom Perengaryprom v. Tayanbarry Parameshwaran Nambudry*.¹ That decision though doubted in *Arakel Kunhi Kuttiyali v. Imbichi Ammah*² and dissented from by the High Courts of Calcutta and Bombay in *Kedar Nath Chatterji v. Rakhal Das Chatterji*,³ and *Shivapa v. Dod Nagaya*,⁴ has never been over ruled and is still binding on this Court; but it really amounts to no more than this, that a judgment-debtor may be the party against whom an order upon a claim in execution proceedings is made so as to be bound by the special rule of limitation prescribed for suits by such a party. Whether he is such a party or not must depend upon the facts of each case. It is obvious that in some cases he could not be the party against whom an order on a claim is made, for the order may be made without notice to him, and even if he has notice, the order may not be one in any way affecting his title. For

1. (1869) 4 M. H. C. R. 472.

2. (1871) 6 M. H. C. R., 416.

3. (1888) 15 Cal. 674.

4. (1886) 11 Bom. 114.

instance, the attachment might be released on the ground that the property was not at the time of the attachment in the possession of the judgment-debtor. It is, we think, for the person who sets up the special bar of limitation against the judgment-debtor to show that he was a party to the execution proceedings and that the order was an order against his interest. In the present case there is nothing to show whether the order releasing the attachment was against the interest of the judgment-debtor, the present plaintiff. Apparently it was not against his inclination for he was found to be colluding with the claimant, the present defendant No. 2. We think it is not shown that the plaintiff is barred by article 11 of schedule II of the Limitation Act. The District Judge finds on the evidence that the house is the property of plaintiff and not of his mother, defendant No. 2."

In *Muthusami v. Ayyalu Bhathadu*,¹ in the course of a claim proceeding, the judgment-debtor attended the Court and gave evidence, but the order allowing the claim did not recite that it was made in the presence of the defendant; it did not refer to the question of title but merely stated that the claimant was in possession and the defendant not. Having regard to the inconclusive character of the evidence of the service of notice on the judgment-debtor, to the fact that it did not appear on the face of the order that the judgment-debtor appeared as a party to the proceedings in which the order was made and to the effect that the terms of the order were not necessarily inconsistent with the title being in the judgment-debtor the order was not against the judgment-debtor within the

1. (1902) 13 M.L.J. 367.

meaning of Order 21, rule 63 and the judgment-debtor was not bound to sue within a year.

So it was held in *Vedalingam Pillai v. Veeralthal*,¹ and it was said that "where the only matter adjudicated upon by the claim order is as to who is in possession and the conclusive effect predicated in Order 21, rule 63 only affects possession and not the title, the order does not bind the judgment-debtor even though he is a party and actually contests the claimant's right and the judgment-debtor and his heirs are not bound to sue to establish their title within a year of the date of the order.

The order
does not bind
the auction-
purchaser.

If the attaching creditor is not himself the auction-purchaser, he cannot be regarded as a party to any order on a claim in which the attaching creditor was represented. In *Narayan Sadoba v. Umbar Adam*,² one Govind Sadoba obtained a money decree against one Haroo Hassan. In execution of that money decree the property in dispute was attached by the judgment-creditor. The present respondent-plaintiff intervened and applied to have the attachment raised on the ground that he was owner of the property. Upon investigation of the claim under sections 280 and 281 of the Civil Procedure Code the Court held that the property belonged to the judgment-debtor, not to the present plaintiff. But it also held that the intervenor was entitled to a lien on the property. Accordingly the Court passed an order that the property should be attached and sold, subject to the lien of the intervenor. The property was sold subject to the present plaintiff's lien, namely, Rs. 687-11-3, and the defendant purchased it at the Court sale. The plaintiff has now brought

1. (1920) 38 M.L.J. 397 = 54 I.C. 530.

2. (1911) 35 Bom. 275.

the suit to recover the amount of the lien which, he contends, has been established conclusively by the order passed in the miscellaneous proceeding. The lower Court has allowed the claim. But it is contended before us by defendant, the auction-purchaser, that he is entitled to question the existence of the lien, that the miscellaneous order does not bind him, and that he was not bound to bring a suit to set aside that order after the sale within a year from its date. It has been held by this Court, in a series of cases, that under the circumstances mentioned above, the action-purchaser cannot be regarded as a party to the miscellaneous order, being not a representative either of the judgment-debtor or of the judgment-creditor: see *Vasanji Haribhai v. Lallu Akhu*¹ and *Vishvanath Chardu Naik v. Subraya Shirapa Shetti*.² Unless, therefore, the plaintiff brings this case within the principle of the decision in *Yashvant Shenvi v. Vithoba Sheti*,³ and *Nemaganda v. Paresha*,⁴ his suit must fail. But these two decisions cannot apply here, because there the auction-purchaser was also the attaching creditor, and therefore, the order was one which bound the parties to it and the suit was brought by the party who was unsuccessful in the miscellaneous proceeding. The second ground is that in the miscellaneous proceeding the plaintiff came in and sought to raise the attachment upon the ground that the property belonged to him. There was no question directly raised by him that he was entitled to a lien. The question of lien came in only incidentally, and, therefore, the order passed by the Subordinate

1. (1885) 9 Bom. 285.

2. (1890) 15 Bom. 290.

3. (1887) 12 Bom. 231.

4. (1897) 22 Bom. 640.

Judge, that the property should be sold subject to the plaintiff's lien, cannot be treated as an order under section 282. It must under the circumstances be regarded as one made under section 287."

At a sale in execution of a decree for money, the defendant-respondent had purchased certain property. Previous to the sale, the plaintiff-appellant had successfully applied to the execution Court to have the sale effected subject to a charge for her maintenance, which she had secured by means of a suit brought by her against the judgment-debtor, and the respondent, accordingly, had purchased the property only subject to the charge. The judgment-debtor was not a party to the objection-proceedings. In the present suit against the respondent, appellant sought to enforce this charge. The lower Courts held that the respondent was not debarred by S. 283 of the Code from disputing the existence of the alleged charge. The contention, raised, in second appeal, that the respondent as execution purchaser is as much bound by the order upon the appellant's objection in execution as the decree-holder, was overruled and it was held that the purchaser was not precluded from contesting the charge, by reason of the above order in execution, on the ground that, if the auction-purchaser is to be bound at all by the order, it must be as representative of the decree-holder and the view that the auction-purchaser represents the decree-holder *quoad* the result of the objection in the execution proceedings involves the anomaly of allowing the former even to file admit under S. 283, of the Code, a course which seems nowhere to be contemplated.¹ Where execution of a simple money decree, the

1. *Mt. Dhoka v. Beharilal Khazanchi*, (1905) 1 N.L.R. 150.

rights of the judgment-debtor in certain property ostensibly subject to a mortgage were put up to sale, but the property was not sold subject to the mortgage, as contemplated by Order 21, rule 62 of the Code, though the existence of the mortgage was notified in the proclamation of sale for the benefit of intending purchasers, it was held on a suit brought by the mortgagee for sale, that the auction-purchaser was not under the circumstances debarred from proving that the mortgage in suit was fictitious and without consideration.¹ Where a property was sold in execution subject to a mortgage in a suit by the mortgagee, the purchaser is not precluded from resisting the claim on the ground that nothing is due on the mortgage and the mortgagee is bound to show that the amount claimed by him is really due, notwithstanding that an order under Order 21, rule 62 has been passed in his favour.²

In *Payapa v. Padmapa*,³ the facts were these : On the 24th March, 1879, property was attached in execution of a money decree against S. was sold on the 22nd September, 1879, and purchased by the plaintiffs' father. Subsequently to the attachment, the defendant caused the same property to be attached in execution of his decree against R. On the 15th August, 1879, S intervened, and claimed the property as his own, but his claim was disallowed, and the property was sold on the 4th August, 1880, and purchased by the defendant himself. The plaintiffs obstructed delivery, but the obstruction was disallowed on the 28th July 1882, and they were dispos-

1. *Shib Kunwar Singh v. Sheo Prasad Singh*, (1906) 28 A. 418.

2. *Lalchand Hiralal Marwadi v. Hasto Bai*, (1893) 7 C.P.L.R. 73.

3. (1886) 11 Bom. 45.

sessed. The plaintiffs, therefore, brought a suit to recover possession. The Court of first instance rejected their claim, on the ground that the omission, on the part of S, to sue to set aside the summary order passed against him on the 15th August, 1879, barred the plaintiffs. The lower Appellate Court reversed that decree. On appeal by the defendant to the High Court, it was held, confirming the decree of the lower Appellate Court, that the plaintiffs' suit was not barred; the plaintiffs' father having purchased under the attachment dated 24th March, 1879, and having thus acquired, by his purchase, the interest of S, as it stood at that date, that interest could not be affected by any subsequent act or omission of the judgment-debtor S.

When the property in respect of which a claim has been disallowed, is sold afterwards, the claimant cannot follow the sale proceeds, unless he sues to set aside the order against him within a year.¹

Rule of one
year for suit
is absolute.

The unsuccessful objector or intervenor, whether he happens to be plaintiff or defendant in the regular suit, is equally bound by the order in the miscellaneous proceedings and the only way open to him is to establish his right by a regular suit within twelve months, at the expiration of which period the order becomes conclusive as against him. He cannot advance his right in defence to an action by an auction-purchaser to recover the property and it makes no difference that the suit by the auction-purchaser is itself instituted within a year

1. *Gogun Chunder v. Dhuronidhur Mundul*, (1881) 7 Cal. 616; *Gurudas Pyre v. Ram Narain*, (1884) 10 Cal. 860 P.C. See however *Venkatachellum Chetty v. Nagappa Chetty*, (1910) 9 I.C. 773 where Art. 29 was applied.

of the order. It was so held in *Nemagauda v. Nemagauda Paresha*.¹ There on a claim by a mortgagee on six mortgages, the claim was allowed in respect of five of them. After the sale was held the auction-purchaser sued for possession offering to redeem the mortgages subject to which the sale took place. The mortgagor asked for payment of the amount due on the sixth mortgage in respect of which the claim has been disallowed and though the suit had been instituted within a year of the order, it was held that the mortgagee could not assert his right in defence to that suit. Ranade J. said "The Judgment in *Velayuthan v. Lakshmana*,² observes in regard to the earlier case, *Bailur Krishna v. Lakshmana*,³ that though the suit in that case had been brought within one year allowed to the objector it was nevertheless held that the latter could not plead his right, though he might have himself brought a suit to establish it. Looking at the wording of Section 283 (now rule 63) it is plain that the Legislature intended to provide only one remedy, that of a regular suit, to set aside the otherwise conclusive effect of the miscellaneous order and it cannot be open to the objector to adopt any other alternative to get rid of the adverse order." So when a claim is rejected and no suit is instituted within a year to declare the claimant's right, the claimant cannot in a suit by the decree-holder for possession of the property plead that he was in adverse possession of the property at the date of the order.⁴

1. (1897) 22 Bom. 640.

2. (1885) 8 Mad. 506.

3. (1880) 4 Mad. 302.

4. *Velayuthan v. Lakshmana*, (1885) 8 Mad. 506. See also *Achuta v. Mammavu*, (1887) 10 Mad. 357.

No need for
suit if attach-
ment is
withdrawn
within a year.

*Ibrahimbai v.
Kabulabai.*

*Kashinath v.
Ramchandra.*

Where, within a year of that order, the attachment, against which a claim was preferred and disallowed, is raised by payment of the decree-amount or is withdrawn by the decree-holder or ceases to subsist for any cause, the claimant need not file a suit to assert his title within a year of that date. In *Ibrahimbai v. Kabulabai*,¹ a claim preferred against an attachment was disallowed on 14th January 1881, but the decree was satisfied by payment on 23rd March 1881. The same property was again attached by the same decree-holder in execution of another decree and the claimant's objection was again disallowed on 9th June 1883. A suit by the claimant within a year after this latter order was in time, because "the second attachment is a new and distinct act giving a new cause of action on which the claimant is entitled to a fresh inquiry and decision." In *Kashinath v. Ramchandra*,² the plaintiff, mortgagee in possession of certain property, applied for the removal of an attachment placed on it by the defendant in execution of a decree against a third party. In default of payment of court-fees by the defendant the attachment was removed, but in ignorance of this fact the plaintiff's application was proceeded with and ultimately rejected. The plaintiff then brought a suit for a declaration of his right, but it was dismissed, on the ground that the attachment had already been removed. Subsequently the defendant placed a second attachment on the property, which the plaintiff again applied to remove. The defendant contended that the plaintiff's application was barred by the proceedings on the first attachment. It was

1. (1888) 13 Bom. 72; *Umash Chander Roy v. Raja Bullubh Sen*, (1882) 8 Cal. 279.

2. (1883) 7 Bom. 408.

held that the decision on the plaintiff's first application having no object existing on which to operate, the attachment having then been removed, it could not properly be regarded as *res judicata* at all, since no one was seriously interested in having it decided in a different way ; and that, supposing submission to that decision on the part of the plaintiff for a certain time could have given it a final effect, there had, as a matter of fact, been no such submission, the plaintiff having done all that was incumbent on him to get the summary inquiry and orders replaced by a formal trial and judgment ; and that there was nothing, therefore, in these proceedings disentitling the defendant to oppose the second attachment ; and that the second attachment, after the first had been removed, was a new and distinct act, giving rise to a new cause of action, or complaint, to the plaintiff, on which, in any case, he was entitled to a fresh enquiry and decision.

In *Gopal Purushottam v. Bai Divali*,¹ on an attachment of property by Gopal, the decree-holder, a claim by Bai Divali on a purchase of the property made on 23rd June 1888, before the date of the attachment, was disallowed on 27th September 1888. Thereupon the judgment-debtor applied to the Court for leave to sell the land by private contract and under such leave Gopal purchased the property and withdrew his application for execution on 20th November 1888. In a suit by Gopal for an injunction against Bai Divali for removal of some culverts, Bai Divali asserted her own title under her purchase and her contention was upheld. Sargent C.J. said " When the plaintiff withdrew his attachment, the parties were restored to the status *quo ante*.

Gopal Purushottam v. Bai Divali.

1. (1893) 18 Bom. 241.

The object of the claim which was preferred by the defendant, as contemplated by section 278, C. P. Code (now rule 58) was to obtain the removal of the attachment and when that attachment was removed by the judgment-creditor's own act on 20th November 1888, there was no longer any attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and therefore no necessity for bringing a suit to set aside the order. Under these circumstances, as section 283 C.P. Code (now rule 63) does not operate as a bar to the present suit, and the defendant's title to the property, which was acquired on 23rd June 1888, is superior to the plaintiff's which was not acquired before November 1888, the plaintiff has failed to establish his right to an injunction and his claim was therefore rightly rejected."¹

Where the attachment was withdrawn owing to another claim by another person, the first claimant whose claim was dismissed is not bound to file a suit to set aside the order against him within a year.² When the same property is attached in execution of several decrees and all attachments are raised on a successful claim, it is not necessary that each attaching creditor should bring a separate suit. If one of the creditors sues and gets rid of the objector's claim, he leaves the road open for other parties having a lien upon the property.³

A contrary view was taken in Allahabad in

1. See also *Krishna Prasad Roy v. Bepin Behary Roy*, (1903) 31 Cal. 228; *Sadaya Pillai v. Amurthathachy*, (1910) 34 Mad. 533.

2. *Subbayya v. Venkataratnam*, (1917) M.W.N. 851=42 I.C. 683.

3. *Chintamani v. Iswar*, (1869) 3 B. L. R. Ap. 122.

Jeoni v. Bhagwan Sahai.¹ It was held there that an order made on a claim, if contested at all, must be contested within one year and after that date cannot be questioned and the fact that the decree was settled after the order was made has no bearing on the point.

Apart from this view of the Allahabad High Court, even elsewhere, the raising of the attachment by payment (or otherwise) more than a year after the order on the claim is of no avail against the finality of the order. In *Koyyana Chitlemma v. Doosy Gararamma*² the facts were these: In July 1890 the father of the plaintiffs mortgaged certain lands to certain parties whose interest is now vested in the defendants. In July 1895 the father executed and registered a sale deed by which he purported to sell the lands in question to the plaintiffs, the lands being in possession of the defendants under the mortgage of July 1890. In Original Suit No. 407 of 1895, a suit against the father, the lands were attached. The plaintiffs preferred a claim to the attached property. This claim was rejected by an order dated the 22nd February 1896 made under section 283 of the Code of Civil Procedure. In July 1898 the father purported to sell the lands to the defendants. In October 1898 when the property was put up for sale in execution of the decree in Original Suit No. 407 of 1895, the late first defendant paid off the the amount due under the decree and the attachment was raised. The plaintiffs then sued to redeem the lands in question.

Attachment raised after one year is of no avail.

1. (1878) 1 All. 541.

2. (1906) 29 Ma. 225, explained in *Ponnaka Balarami Reddi v. Pazi Mahomed*, (1915) 26 M.L.J. 499=26 I.C. 532.

It was said "It is not necessary for us to decide whether the fact of the money having been paid-off by a third party, would be a good ground for distinguishing the present case from the cases to which we have referred. We are of opinion, however, that the payment off not having been made within a year after the date of the order, the order is conclusive as between the claimants (the plaintiffs) and the defendants. To hold otherwise would lead to uncertainty of title and would be inconsistent with the policy of the legislature in prescribing a short period of limitation for suits by parties against whom an order has been made in claim proceedings. To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience. On the facts of the case we are of opinion that the order under section 283 was conclusive as between the plaintiffs and the defendants, and the order of the lower Appellate Court cannot be supported on the ground that it was not."

The same view was taken in *Bibi Alimanu v. Dhakeswar Pershad*.¹ It was said "The object of such a suit is not to set aside, but to have the right of the claimant in the property established. If the unsuccessful party in the claim proceeding fail to institute such a suit within the prescribed period of limitation, the order becomes conclusive as regards

1. (1904) 1 C.L.J. 296; *Luckhee Frea Dibia v. Khyroollah Kazee*, (1870) 14 W.R. 367; *Dedar Buksh v. Ake Cource Singh*, (1872) 18 W.R. 21.

the rights of the parties to the proceeding and persons claiming title under them."

In *Harishankar v. Naran Karsan*,¹ the plaintiff obtained a decree against one Ishvar, and in execution attached the property in dispute. The defendants intervened, and obtained an order for the removal of the attachment on the 11th August, 1888. On the 13th August, 1889, the plaintiff instituted this suit for a declaration that the property belonged to his judgment-debtor (Ishvar) and as such was liable to attachment and sale. The defendants pleaded that they had been in possession of the property for more than twelve years prior to the institution of the suit, and that the suit was, therefore, barred. It was held, that the suit being brought under section 283 of the Civil Procedure Code, 1882, was one to set aside the order of 11th August, 1888, directing the removal of the attachment, and should be determined by ascertaining the rights of the parties at the date of that order and as the defendants had not at that date acquired a title to the property by adverse possession for twelve years, the plaintiff was entitled to a decree.

In *Ponnaka Balarami Reddi v. Hazi Mahomed*² the attachment of the property was objected to by three different objectors on different grounds. The first objector claimed to be a *bona fide* purchaser before attachment, the second claimed to be a mortgagee, while the third claimed that the property had devolved upon him by survivorship under Hindu law. The Court accepted the contention of the third objector and held that the grounds relied

1. (1893) 18 Bom 260. See also *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite*, (1910) 12 Bom. L.R. 956.

2. (1915) 26 M.L.J. 499=26 I.C. 532.

upon by the first objector were not well-founded. But all the same it raised the attachment of the property by one joint order dealing with all objection petitions: It was held that as the order raised the attachment, it was not against the first objector and that it could not be interpreted as against him simply because the Court had expressed an opinion that his grounds were not well founded. Tyabji J. said "In so far as any decision of the claims of parties other than the judgment-debtor is necessary for the continuance of the execution proceedings, that decision has to be promptly given by the authorities entrusted with the execution proceedings in the exercise rather of administrative than judicial functions; and in so far as on their decision the execution proceedings are carried out, the parties who are affected by their decision have a short period of limitation within which that decision can be contested. The decisions during the course of the execution are necessary for the execution proceedings being carried through and it is necessary that such proceedings shall not be delayed, nor their effect kept in suspense, after they have been acted upon. If, however, for any reason the execution proceedings are not pursued to their end, and if the parties are, owing to the arrest of such proceeding, left in the same state in which they were prior to the attachment, then the whole of the proceedings arising out of the attachment, and the claim petition are, so to say, wiped out, and the petitioner is not concerned with what may have been incidentally held with a view to that being effected which ultimately was not given effect to, though it may be cessation of the attachment and the execution proceedings following it were not

brought about by circumstances controlled by the unsuccessful claimants."

The summary remedy provided by the C. P. Code is only an alternative and the claimant's general right of suit is not barred.¹ Where a property is attached, a person claiming any interest in it is not bound to assert his right by an objection to the attachment before the Court of execution; so where a judgment-creditor, seeking execution against property alleged to be of the judgment-debtor, is met with a plea that the property in question is not the property of the judgment-debtor, the judgment-creditor is not obliged to take proceedings under S. 278 and wait until an adverse order is passed in those proceedings but may at once institute a regular suit for a declaration that the property sought to be taken in execution is the property of the judgment-debtor.² The claimant has a right to pay up the decretal amount, save the property from sale and sue to recover the amount from the person who wrongfully attached the property.³ In order that a plaintiff, who, after being unsuccessful in the summary proceeding, taken by him under S. 278, for the purpose of getting the release of an attachment issued in a suit in which he was not a party, succeeded in a subsequent suit instituted under

Remedy
alternative.

1. *Sundar v. Ghasi*, (1896) 18 All. 410; *Rani Indomati v. Jageshar*, (1906) 28 All. 644; *Baswantappa v. Shidappa*, (1884) 9 Bom. 86; *Raghunath v. Sarosh*, (1898) 23 Bom. 266; *Krishnabhupati v. Vikrama*, (1894) 18 Mad. 17.

2. *Makbul Fatima v. Lalta Kunwar*, (1907) 4 A.L.J. 574.

3. *Kanhaiya Lal v. The National Bank of India Ltd.*, (1913) 40 Cal. 598 P.C.; *Jugdeo Narain v. Raja Singh*, (1888) 15 Cal. 656; *Bama Sundari v. Adhar Chunder*, (1894) 22 Cal. 28; see also *Maharaja Shri Jaswantsingji v. Secretary of State*, (1889) 14 Bom. 299; *Lutchmee Doss v. Secretary of State*, (1909) 32 Mad. 456; *Tulsha Kunwar v. Jageshar*, (1906) 28 All. 563.

S. 283, C. P. Code, 1882, in establishing his right of property in the goods, might be entitled to full indemnity for the wrongful attachment, he was not bound to allege and prove that the defendants resisted his application under S. 278, maliciously and without probable cause.¹ Where a person claiming attached property as his pays the decree-amount to get the property released, the Court has no power to order a refund. If the claimant intended to have the summary remedy he must have applied and secured a release of the attachment, but not having done so, it became obligatory on him to file a suit for the purpose of recovering the money.²

Limitation
for suit.

A suit to set aside a summary order passed on a claim must be brought by the aggrieved party, whether he be the claimant or the decree-holder,³ within a year from the date of the order.⁴ Claims founded on mortgages are as much within these rules as any other claim. A suit to set aside a claim founded on a mortgage is governed by this limitation.⁵ The date of the order is the date on which it is signed⁶ by the executing Court. If an appeal or revision is competent, the limitation will run from the order on appeal or revision, but not if otherwise.⁷ When an application for review is re-

1. *Kissori Mohun Roy v. Harsukh Das*, (1890) 17 Cal. 436 P. C.

2. *Varajlal v. Kachia*, (1896) 22 Bom. 473.

3. *Bailur v. Lakshmana*, (1882) 4 Mad. 302; *Sardharilal v. Ambika Pershad*, (1888) 15 Cal. 521 P.C.; *Ram Niranjan v. Khanu Rai*, (1920) 57 I.C. 5.

4. Indian Limitation Act (IX of 1908), Art. 11.

5. *Ponnusami Pillai v. Samu Ammal*, (1916) 31 M.L.J. 247 = 38 I.C. 937.

6. *Bapu v. Lakshuman*, (1873) 10 B.H.C R. 19.

7. *Dayaram v. Govardhandas*, (1904) 28 Bom. 458; *Mg Tunu v. Pallaniappa*, (1915) 27 I. C. 829; *Venugopal v. Venkata Subbaya*, (1915) 28 I.C. 367; *Sardharilal v. Ambika Pershad*, (1888) 15 Cal. at 523 P.C.

jected, limitation runs from the date of the original order only; if review is granted and after that the case is heard and the original order is affirmed, time would run from the date of the order of affirmation.¹

Except as provided by the Indian Limitation Act, the Court has no discretion to enlarge this period of limitation.²

In *Gopal Singh v. Ganpat Rai*,³ an objection to attachment was rejected summarily by reason of its belated appearance. The plaintiff then brought a regular suit for a declaration, but that suit was dismissed for default in December 1914. There being no adequate bid for the property, the decree-holder in 1912 withdrew his execution and presented a fresh application for sale in 1915 and proclamation of sale was made. The plaintiff then brought the present suit for the same declaratory relief as in the suit of 1912. It was held that the suit was barred and that the fresh proclamation of 1915 furnished no new cause of action.

A suit which is otherwise within time may yet be barred by the operation of Article 11 of the Limitation Act.⁴ For instance, where an order is made on a claim declaring that the attached property belongs to the joint family or not, the order must be challenged by a regular suit within a year,⁵ and the defeated claimant cannot evade this bar of limitation by afterwards suing for his right in the

Art. 11
shortens
limitation.

1. *Venugopal v. Venkatasubbayya*, (1915) 28 I.C. 367.

2. But see per Jenkins C. J. in *Dayaram v. Govardhandas*, (1904) 28 Bom. 458.

3. (1916) P.R. 66 = 35 I.C. 321.

4. See *Muthirulandi Poosari v. Sethurama Aiyar*, (1919) 42 Mad. 425 (under the Madras Survey and Boundaries Act, 1893).

5. *Bailur Krishna v. Lakshmana*, (1879) 4 Mad. 302.

guise of a suit for partition.¹ Similarly when a claim is disallowed, and no suit is brought within a year, the claimant cannot get over the bar by suing to set aside the sale, after the sale takes place in execution.²

Art. 11 does
not extend
limitation.

Conversely, a suit though brought within a year of the order on a claim may yet be barred under other provisions of the Limitation Act. If, for instance, a person whose title had become extinguished by adverse possession prefers a claim against attachment of the property and his claim is rejected, his suit to establish his title may be barred under Article 142 or 144 of the Limitation Act.³

In *Pemraj v. Narayan*,⁴ S obtained a money decree against the sons and heirs of A, and under that decree attached a shop as part of A's estate. N (father of A) applied to have the attachment removed under section 246 of the Civil Procedure Code (Act VIII of 1859), alleging that the shop was his. The application was rejected, and the shop was sold in execution, and bought by P, the defendant. N then brought this suit against P (the purchaser) to establish his title. It was held that the plaintiff having proved his possession at the date of the execution sale, it lay upon the defendant (P), who claimed the property, to prove a title in himself or in the

1. *Bhimappa v. Irappa*, (1901) 26 Bom. 146. See *Chail Behari Lal v. Kidarnath*, (1919) 57 I.C. 787.

2. *Venkappa v. Chenbasappa*, (1879) 4 Bom. 21; *Krishnaji v. Bhaskar*, (1880) 4 Bom. 64; *Surnamoyi v. Ashutosh Goswami*, (1900) 27 Cal. 714. See contra *Gend Lall v. Denonath*, (1885) 11 Cal. 673; and *Gopal Chunder v. Mohesh Chunder*, (1883) 9 Cal. 230; *Narasimma v. Appalacharlu*, (1888) 12 Mad. 294, under the old law.

3. *Vasudeo Atmaram v. Eknath*, (1910) 35 Bom. 79. See also *Harnam Singh v. Kishen Chand*, (1919) 50 I.C. 6.

4. (1882) 6 Bom. 215.

judgment-debtor A, and that, he having failed to do this, the plaintiff was entitled to a decree declaratory of his right to the property as against the defendant. West J. said that "a person in possession of property which is sold in execution as that of another, is not called upon, when suing to establish his title, to prove his proprietorship as by an action *in rem* against all the world. It is enough if he establishes a good title as against the judgment-debtor whose right has been sold; and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purpose of the suit except so far as the right vested in the judgment-debtor can be shown affirmatively to contradict or qualify it. Possession constitutes an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it, and, therefore, where a person in possession of property which has been sold in execution as being the property of another, sues to establish his title to such property, the burden of proof lies, not upon him, but upon the person who claims as purchaser at the execution sale."

The right of suit under rule 63 is not a personal one and a purchaser of the property from the unsuccessful claimant can institute the action.¹ A decree-holder has a statutory right to sue under this rule in his personal capacity as a decree-holder respecting merely his own right to have the property attached under his decree. He is not obliged to take the general ground that as against all other

Nature of
suit under
rule 63.

1. *Ganesh v. Kashinath*, (1903) 26 All. 89 (The transfer is not affected by section 52 of Transfer of Property Act); *Adjoodhya v. Sheodass*, (1886) 1 C.P.L.R. 3.

creditors and all other persons a mortgage or sale is to be void.¹

The statutory right is to establish the right which the attaching plaintiff claims in the property (i.e.,) to attach it as the property of the defendant whenever it is his interest to do so. The fact the attachment before judgment effected by him ceases to be operative on the dismissal of the suit by virtue of Order 38, rule 9 of the C. P. Code does not also cause the suit under order 21, rule 63 to abate.²

Although an attaching creditor withdraws his attachment, though he cannot file a suit under rule 63, he can file a suit under Section 42 of the Specific Relief Act, for a declaration that the property sought to be attached belonged to the judgment-debtor.³ Though the attachment ceased by the time of the institution of the suit, by the satisfaction of the decree, the plaintiff, whose claim was disallowed, has a good cause of action, in order to remove the doubt thrown on his title,⁴ and it makes no difference if the property is in the meantime sold in execution of the decree.⁵

Parties to
suit.

When the decree-holder brings a suit against a successful claimant to establish that certain property belongs to the judgment-debtor and that he is entitled to bring it to sale in execution of his decree,

1. *Lok Nath v. Thakar Das*, (1923) 71 I.C. 20 see also *Pokker v. Kunhamad*, (1918) 42 Mad. 143.

2. *Ramaswami Chetty v. Alagiri Chetty*, (1914) 27 I.C. 800.

3. *Chan Tat v. Ma Lat*, (1916) 9 Bur. L. T. 89=33 I. C. 124 ; *Maung Ba v. Lan*, (1918) 45 I. C. 972. See also *Miran Baksh v. Atrā*, (1900) P.R. 111.

4. *Sripethy v. Kartick*, (1882) 9 Cal. 10.

5. *Mt. Manik v. Nanias Agarwala*, (1923) 1 Pat. L. R. 51=70 I.C. 332.

the only person against whom he claims relief is the successful claimant and to such a suit the judgment-debtor is not a necessary party. If however an unsuccessful claimant seeks for a declaration of his right against both the decree-holder and the judgment-debtor, the latter is a necessary party to his suit.¹ When a claim has been rejected and the properties have been sold and purchased by a stranger, the decree-holder is not a necessary party to the claimant's suit.² To a suit of the claimant creditors of the judgment-debtor other than the attaching creditor are not necessary parties.³

A suit under Order 21 rule 63 of the Code is essentially a suit for the review of a summary decision. The order on the claim is the cause of action.⁴ The words "the right which the plaintiff claims to the property in dispute" in rule 63 mean the right which is claimed in that proceeding in respect of the property, that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. When, therefore, a claimant, being unsuccessful in a claim has got the property released from attachment by coming to terms with the decree-holder without notice to the judgment-debtor, a suit subsequently brought by him against the judgment-debtor for recovery of possession is not barred under rule 63.⁵

1. *Ghasi Ram v. Mangal Chand*, (1905) 28 All. 41; *Jit Bhagat v. Sheik*, (1901) A.W.N. 14.

2. *Subbaraya Mudaliar v. Kandasamy*, (1923) 70 I. C. 168. See *Shiboo Narain v. Mudden Ally*, (1881) 7 Cal. 608.

3. *Surendranath v. Kiran*, (1909) 1 I. C. 428.

4. *Abdul Khader v. Ali Meah*, (1912) 16 C.W.N. 717=14 I. C. 715; *Doraisami v. Muthusamy*, (1904) 27 Mad. 94; *Veera v. Karuppa*, (1909) 6 M.L.T. 154=2 I. C. 980; *Alexander v. Mathuradas*, (1886) 8 All. 6 P.C.

5. *Morshia Barayal v. Elahi Bux Khan*, (1903) 3 C.L.J. 381.

Form of suit.

The Code of Civil Procedure does not indicate the form in which a suit should be brought under Order 21, rule 63, but the effect of such a suit is clear. Under that rule the party, against whom an order under Order 21, rules 59 to 62 is passed, may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. The language seems distinctly expressive. It implies that the order in execution is subject to the result of the suit, or, in other words, is affected by the decree, whatever it may be, either by way of confirmation, modification or reversal. Consequently, the effect of a decree affirming the right of the intervenor to the property attached as that of the judgment-debtor has the effect of declaring the execution proceedings against such property to be null and void, and, as if they had never been so far as they have transferred possession of the property to any one else.¹ The bar therefore that will arise from inaction for a year after the summary order may be reversed by any kind of regular action and the form in which the suit is framed is immaterial. The suit need not be limited to the purpose indicated in rule 63, namely, the establishment of the right denied in execution proceedings. The plaintiff is at liberty to pray in the same suit for consequential relief to which he may be entitled.² Where the object of a suit is to establish that the property is liable to attachment in execution of the plaintiff's decree to the extent of the defendant's interest in it, it must be treated as one falling under

1. *O. K. Abdula Brothers & Co. v. Chotalal Sunderji & Co.*, U.B.R. (1892—1896), Vol. II. 255 ; see also *Shiboo Narain v. Mudden Ally*, (1881) 7 Cal. 608.

2. *Sadu v. Ram*, (1891) 16 Bom. 608.

this rule. When the right of the defendant in the land is an interest in land and is property, a suit by the plaintiff to declare his right to recover his decree-debt from it, denied by the defendant, will lie under Section 42 of Specific Relief Act, 1877, and as the Civil Procedure Code does not deal with forms of suits,¹ the substance and merits of the case should be kept in view and not merely the words in the plaint, so that the actual form of the suit is of little consequence.

When after the attachment of property, the judgment-debtor became an insolvent and the attachment was raised on the claim of another person, the decree-holder has a statutory right of suit to declare that the property belonged to his judgment-debtor and for such a suit the official assignee is not a necessary party after the judgment-debtor's insolvency.²

Where a decree-holder who had fraudulently obtained a decree and improperly purchased the property brings a suit under rule 63, the defendant is entitled to set up the plea that the suit from the beginning to the end was a fraud.³ So it is open to an attaching decree-holder to plead in defence to a suit by the alienee whose claim has been rejected that the alienation is a fraudulent one intended to defeat or delay the alienor's creditors.⁴

1. *Miran v. Atra*, (1900) P.R. 111; *Sardar Dial Singh v. Beliram*, (1897) P.R. 51; *Raja Rup Singh v. Rani Baisni*, (1884) 7 All. 1 P.C.; *Sabapadi v. Maung In*, L.B.R. (1893—1900) 481; *Raghunath v. Sarosh*, (1898) 23 Bom. 266; also *Hari Mohan v. Hursook*, (1885) 12 Cal. 696.

2. *Annapurni v. Subramanian*, (1908) 31 Mad. 347.

3. *Bala Gauri Vallabha Devar v. Periasami Udayar*, (1894) 17 Mad. 389; *Bama Charan v. Bagala Charan*, (1914) 23 I.C. 755.

4. *Ramaswami Chettiar v. Malappa Reddiar*, (1920) 43 Mad. 760 F.B. overruling (1918) 41 Mad. 612 F.B.; *Abdul Kadir v. Alimiah*, (1912) 16 C.W.N. 717=14 I.C. 715.

Burden of
proof.

Where the claimant fails to establish his claim to attached property in summary proceedings, and institutes a suit to declare his title, it is on him to satisfy the Court that the documents on which he bases his title represent a genuine transaction, that they are as good as they look and the burden is not on the defendant in the first instance to give evidence of its fraudulent and collusive nature.¹ Likewise even when it is proved that the claimant was in possession at the date of the attachment he must show that such possession was in his own right and not as trustee for the judgment-debtor.² So when a mortgagee or vendee sues to establish his mortgage or sale, it is not sufficient to prove execution and registration, for, as against a third party, the presumption of consideration does not arise on proof of execution and the plaintiff must prove good consideration for the conveyance.³ Conversely when the claim of a third person is allowed and the attachment is raised and the decree-holder institutes a suit for a declaration of the judgment-debtor's title to the attached property, the onus is on him to

1. *Nannhi v. Bhuri*, (1908) 30 All. 321; *Ramnath v. Brindaban*, (1896) 18 All. 369; *Jamahar v. Askaran*, (1915) 22 C.L.J. 27 = 30 I.C. 855; *Rajaseth v. Mt. Jankee*, (1895) 9 C.P.L.R. 142; *Naraklal v. Thagoo Lal*, (1912) 22 C.L.J. 380 = 13 I.C. 455; *Raghubar v. Kaniz Hussain*, (1909) 12 O.C. 74 = 2 I.C. 258; *Masein v. Lachmanan*, (1908) 4 L.B.R. 228; *Rama v. Halagua*, (1918) 41 Mad. 205; *Kalka Prasad v. Sitla Baksh*, (1916) 19 O.C. 64 = 35 I.C. 427; *Haji Baboo v. Sobhag Chand*, (1919) 55 I.C. 752; *Laiq Ram v. Thola Singh*, (1919) P.L.R. 47 = 50 I.C. 884; *Avadhut v. Punjabi*, (1919) 53 I.C. 205; *Laiq Ram v. Thola Singh*, (1919) 50 I.C. 884; *Hajee Aboo v. Sobhag Chand*, (1919) 55 I.C. 752; *Modadagu Perayya v. Peroli Venkayamma*, (1924) 44 M.L.J. 14; *Saraswati-bai v. Yadorao*, (1924) 78 I.C. 887; *Mt. Sundar v. Babu Lal*, (1924) 7 N.L.J. 9; *Mulla Faiz Ali v. Mt. Harkuar*, (1923) Nag. 334 = 77 I.C. 50.

2. *Chokalingam v. Maung Yeik*, U.B.R. (1897-1901), II. 270.

3. *Mothu Curpan v. Yagappa*, L.B.R. (1893-1900), 333.

prove the judgment-debtor's title at the date of the attachment.¹

In a suit by a defeated claimant claiming under a transfer from the judgment-debtor the ordinary method of establishing the *bona fides* of transfer is to prove that the consideration passed and that possession was actually transferred, and this being done, the onus would be shifted on to the contesting party to show that there was nevertheless an intention to defeat creditors.² The evidence taken in the summary proceedings may be admissible on certain conditions under section 33 of the Indian Evidence Act, but it is not proper to admit the evidence in the summary case when the deponents themselves are available.³

The true issue in a case under this rule is an issue purely of fact. The Court has to determine whether the property sought to be attached was at the date of the attachment in the possession of the judgment-debtor as his own property or was in the possession of some other person in trust for him. If that be found against the judgment-debtor the plaintiff, the original decree-holder, is entitled to the declaration which is sought.⁴ If therefore an attachment was raised at the instance of some objectors, and a suit was instituted to declare the judgment-debtor's title, the objectors must have completed an

Scope of inquiry.

1. *Shekh Adam v. Jamnadas*, (1892) 17 Bom. 94; *Bhagwant v. Kedari*, (1900) 25 Bom. 202; *Vasudeo v. Eknath*, (1910) 35 Bom. 79. But see *K. Y. K. M. Chetty v. S. N. V. R. Chetty*, (1916) 9 Bur. L. T. 199=34 I.C. 125.

2. *Raghunath v. Nathu*, (1919) 55 I.C. 72.

3. *Nga Seck v. Nga Pu*, (1913) 22 I.C. 676.

4. *Surendranath v. Kiran*, (1909) 1 I.C. 428; *Abdul Kadir v. Alimia*, (1912) 16 C.W.N. 717=14 I.C. 715. See *Kishori Mohan v. Harsook*, (1885) 12 Cal. 696.

adverse possession of twelve years before the date of the attachment, so as to enable them to assert title in themselves as against the judgment-debtor.¹

Where in his suit under this rule the claimant claims both in form and substance against the judgment-debtor a declaration of his title to the whole of the property, the title to which is in issue in the suit, the decree in such suit, declaring the liability or nonliability of the property to attachment and sale in execution of the creditor's decree, must necessarily, unless the suit be decided on the ground not involving the question of title, decide and determine all questions of title on which the parties to the suit could rely so that such decision would operate in any further suit between the parties as *res judicata* on those questions of title, though such subsequent suit must relate to property not in question in the prior suit under rule 63.²

The suit under rule 63 is a mere continuation of proceedings in a claim-petition and alienations after the order but before suit are affected with *lis pendens*.³

A suit to recover costs, incurred in unsuccessfully objecting to an attachment of property in execution of a decree is maintainable, when it is shown that the defendant had no colorable justification for attaching the land or for defending the application for the removal of the attachment.⁴

Valuation for
court-fee.

Under Order 21 rule 63, C. P. Code 1908, the party against whom an order is made—confirming

1. *Harishankar v. Naran*, (1893) 18 Bom. 260; *Vasudeo Atmaram Joshi v. Eknath Balkrishna*, (1910) 12 Bom. L.R. 956 = 8 I.C. 639.

2. *Dwarka Das v. Kameshar*, (1895) 17 All. 69.

3. *Krishnappa v. Abdul Khader*, (1915) 38 Mad. 535.

4. *Palneappa v. Maung Shwe Ge.*, U.B.R. 1904, 1st Qr. C.P. Code, 4.

or vacating the attachment under a decree—may institute a suit to establish the right which he claims in the property in dispute. Various views have been expressed on the valuation of such suits and these are thus summarised.

In Madras a suit by a claimant in possession for a declaration that the property attached belonged to his family and was not liable to attachment was held to be one for declaration with no consequential relief and to fall under Article 17, clause iii of the Court-Fees Act,¹ and a suit by a claimant for a declaration of his title to a share in the property attached was held to be one to set aside a summary order and to fall under Art. 17, clause i.² Madras.

In Bombay and Lahore a suit under Order 21, rule 63 falls under clause i of Article 17 of Schedule II of the Court-Fees Act as one to set aside a summary order³ and an addition of a prayer for possession does not make a difference.⁴ In *Dayachand v. Hemchand*,⁵ it was said that the suit brought to set aside or restore an attachment under section 283 of the old Code (now Order 21, rule 63) might be regarded, either as a suit seeking not only a declaration of the plaintiff's right, but also substantial consequential relief in the setting aside or restoration of the attachment so as to fall within Section 7 cl. iv (c) or as a suit to set aside a summary decision or order under Art. 17 cl. i and that the Court-Fees Act being a fiscal enactment it Bombay and Lahore.

1. *Narainan v. Nilakandan*, (1881) 4 Mad. 131.

2. *Vithal v. Balkrishna*, (1891) 15 Mad. 288.

3. *Sadasiv v. Atmaram*, (1876) 4 Bom. 535; *Vithal v. Balkrishna*, (1886) 10 Bom. 610 F. B.

4. *Dhondo v. Govind*, (1884) 9 Bom. 20.

5. (1880) 4 Bom. 515 F. B.

was the duty of the Court to treat such suits as belonging to the latter class and to impose the lower fee as it would press least heavily upon the subject.¹ A similar view has been taken in the Punjab.²

Calcutta.

In Calcutta it was said that a suit by a defeated claimant for a declaration of his title to the property fell under Article 1 of Sch. I and was chargeable with *ad valorem* fee and not with the fixed fee under Article 17, clause i, because as the learned judges thought "It seems to us that this was a suit where consequential relief was asked for."³ It was a suit which was brought for the purpose of establishing the plaintiff's right to the property in question and with a view to free the property from the attachment which had been put upon it and to protect it from being sold as the property of Mahomed Mirza."⁴ But the question in these cases was whether a fixed fee or an *ad valorem* fee was payable.⁵ If therefore it is considered, as in the case aforesaid, that a consequential relief is meant, then the plaintiff can under Section 7 cl. iv (c) put his own valuation on his relief and will not be obliged to pay the fee on the market-value of the property.

So a suit for a declaration of the plaintiff's right to property attached, and for possession thereof and for perpetual injunction restraining sale thereof in execution, was held maintainable, but such a suit

1. See *Dayaram v. Gordhandas*, (1906) 31 Bom. 73.

2. *Sardar Dial v. Beliram*, (1897) P. R. 51 overruling *Karamuddin v. Jewant*, (1886) P.R. 80.

3. *Mufti Jalabudden v. Shohorullah*, (1874) 22 W.R. 422 ; See also *Bhuroonissa v. Kureemoonissa*, (1872) 19 W.R. 17.

4. *Ahmed v. Thomas*, (1886) 13 Cal. 162.

5. *Modhrisudan v. Rakhal Chunder*, (1887) 15 Cal. 104.

was one in which consequential relief was asked for and was subject to *ad valorem* court-fee.¹

In Allahabad a suit to declare a right to property attached² or to set aside an adverse order passed summarily³ falls under clauses iii and i respectively of Article 17 and in either case the court-fee payable is fixed only. But opinion is not uniform where a relief for possession of the property⁴ or the setting aside of the order⁵ is superadded to a prayer for declaration.

In *Moti Singh v. Kaunsilla*,⁶ the Full Bench observed that the relief against attachment and sale would necessarily follow on the making of the decree declaring the plaintiff's title to the property in dispute. In laying down the test for determining whether a suit brought under section 283 of the Code contains one or more declarations, it was said "It appears to us that where a claimant whose objection under S. 278 of the Code of Civil Procedure has been disallowed brings a suit, and makes the judgment-creditor, who was trying to execute the decree, the sole defendant to the suit, a claim for a declaration that the property under attachment was the plaintiff's property and not liable to attachment in execution of the decree of the defendant is a claim for only one declaration, and that for such purposes and in such a suit it is immaterial whether the claim is that the property is the plaintiff's and not liable to attachment, or that the property is the

1. *Phulkumari v. Ghanshyam*, (1904) 31 Cal. 511.

2. *Chunia v. Ram Dial*, (1877) 1 All. 36.

3. *Fatima v. Sakharam*, (1884) 6 All. 341.

4. *Ram Prasad v. Sukh Dai*, (1880) 2 All. 720 F.B.

5. *Gulzari v. Jadaun*, (1878) 2 All. 63; *Dildar v. Narayan*, (1889) 11 All. 365. See also *Ostoché v. Haridas*, (1880) 2 All. 869.

6. (1894) 16 All. 308 F.B.

plaintiff's as against the defendant's right to attach and that the order in attachment should be cancelled. When the judgment-creditor is the sole defendant in the suit it appears to us that the claim worded in either of these ways must be regarded as a claim for only one declaration. Where, however, the person objecting under S. 278 of the Code brings his suit, and makes not only the execution-creditor in the attachment proceedings but also the judgment-debtor in those proceedings parties to the suit, and asks for a declaration of the plaintiff's title to the property under attachment as against the judgment-debtor and also asks for a declaration in denial of the judgment-creditor's right to bring that property to sale in execution of the judgment-creditor's decree, there are two substantial declarations asked for. One reason which has induced us to come to this latter conclusion is that in such a suit where the judgment-debtor is one defendant and the judgment-creditor is another defendant, the plaintiff might, as against the judgment-debtor, be entitled to a decree declaring his title to the property as against the judgment-debtor, and yet, by reason of some representation to the judgment-creditor, such plaintiff might be estopped from denying, as against the judgment-creditor, that the property in question was the property of the judgment-debtor liable to be sold in execution of the decree of the judgment-creditor. In the last case the rights of the two separate sets of defendants would have to be adjudicated upon, and declarations, if the plaintiff's prayer was acceded to, given in denial of the right of each defendant, whereas in the first case the substantial and only question between the plaintiff and the judgment-creditor, sole defendant, would be the right or

absence of right of that judgment-creditor to bring the property in dispute to sale in execution of his decree. Where the execution-creditor, as the person against whom the adverse order in attachment proceedings was made, brings his suit, he need only pay one 10 rupees fee if he confines himself to asking for a simple declaration that as between him and the objector he is entitled to bring the property in question to sale in execution of his decree. We do not suggest that such a declaration would in every case be sufficient without anything else. If however, such execution-creditor, plaintiff, chooses to ask, for instance, not only for a decree that he is entitled to bring the property to sale, but also for a decree that a deed of transfer from the execution-debtor to the objector was void as against him, by reason of S. 53 of Act No. IV of 1882, he must pay for more than one declaration. A prayer, however, in such a suit for cancelment of an adverse order in the attachment proceedings and for a declaration that the plaintiff, execution-creditor, is entitled to bring the property in dispute to sale is, in our opinion, a claim for one and the same declaration ; it is in fact only putting the same claim in a different way."

In Burma a suit under this rule for a declaration only without consequential relief comes under cl. i of Article 17.¹ Burma.

This variety of opinion on the question of court-fees for a suit under Order 21 rule 63 is a bewildering confusion. The right of suit consequent on an order passed under rules 60 and 61 is the creation of the statute and the nature and object of Review of the opinions.

1. *Maung Po v. Maung Aung*, L.B.R. (1893-1900) 139 ; *Nga Seck v. Nga Pu*, (1913) U.B.R. 181=22 I.C. 676.

that suit is limited by it : “ the party against whom an order is made may institute a suit *to establish the right which he claims to the property in dispute* ” and the order which negatives the right is summary. A suit therefore which is instituted to get over the effect of the order, to establish the right on which the order has thrown a cloud, is on its face meant to be declaratory. This special form of a declaratory suit is an exception to the rule enacted against declaratory suits without consequential relief in the Specific Relief Act.¹ Where an order has been passed under rules 60 and 61 there is a summary order to be set aside and the means of questioning the order is by a declaration of the right denied by it. In such cases, a prayer for a declaration of the right so denied or a prayer for setting aside the summary order are synonymous and if both these reliefs are expressed in the plaint, it is but a redundant expression.

It would therefore be wrong in such cases to construe the two reliefs as distinct and as chargeable with two fees of Rs. 10 each under clauses i and iii of this Article 17.² It would equally be wrong to construe the relief to set aside the attachment, or to restore the attachment as a consequential relief and charge the plaint with a court-fee under Section 7 cl. iv (c).³ In such a case Art. 17

1. *Krishnam Soorayya v. Pathma Bee*, (1906) 29 Mad. 107 F.B.; *Sivaraman v. Maung Po*, (1902) 1 L.B.R. 1; *Sabella Appana v. Malladi Appanna*, (1914) 16 M.L.T. 300 = 25 I.C. 700; *Sahib Dyal v. Lajpat Rai*, 10 P.R. 1912 = 14 I.C. 510.

2. See *Gulzari v. Jadaun*, (1878) 2 All. 63; *Dildar v. Narayan*, (1889) 11 All. 365.

3. *Ram Prasad v. Sukh Dai*, (1880) 2 All. 720 F. B.; *Ostock v. Haridas*, (1880) 2 All. 869. See also *Dayachand v. Hemchand*, (1880) 4 Bom. 515.

cl. iii, does not come into operation¹ and the only provision applicable is Art. 17 cl. i, which prescribes a fee of Rs. 10 for a suit to alter or set aside a summary decision, order &c.²

In *Phul Kumari v. Ghansyam Misra*,³ the Privy Council may be said to have set the conflict of views at rest. There on a claim against attachment being rejected, the claimant instituted a suit for declaration of her right to the property and for an injunction restraining the decree-holder from executing his decree. Their Lordships reversed the decision of the Court below and said that the suit was one under section 283, C.P. Code, 1882 and for such suit the proper fee was payable under Schedule II, Article 17 (i). It was said "The terms of sub-section 1 of Article 17 (which they hold to apply) contain no reference to value. In like manner the class of suits dealing with arbitration awards is coupled with suits, such as that immediately in question; awards may be of value of Rs. 10 or of value of Rs. 1,00,000, and yet no distinction is made. In short the statute, for good reasons or bad, has dealt with certain actions irrespective of value; and the present action is one of them."

*Phul Kumari
v. Ghansyam
Misra.*

It has been held therefore that a plaint in a suit of the nature indicated in Order 21 rule 63, C. P. Code, 1908 is not chargeable with an *ad valorem* court-fee but with a fixed fee only,⁴ whether the petition was dismissed with or without

1. See *Chinna v. Rama Dial*, (1877) 1 All. 360.

2. *Fatima v. Sakharan*, (1884) 6 All. 341.

3. (1907) 35 Cal. 202 P.C.

4. *Gol Asmater v. Habibulla*, (1920) 64 I.C. 49. See also *Nga Seck v. Nga Pu*, (1913) 22 I.C. 676.

investigation,¹ though the property had in the meantime been sold in execution.²

Chandradhari v. Tipan Prasad.

In *Chandradhari v. Tipan Prasad*,³ Roe J. said "where a plaintiff asks only for the release of his property from attachment after a claim made by him in respect of that property has been rejected, the court-fees payable are to be calculated in accordance with Sch. II. Art. 17 (i) and fixed at Rs. 10. If the ostensible owner is joined as a party to the suit and a suggestion made in the plaint that the ostensible owner is in wrongful possession of the property and a prayer made for restoration thereto, the court-fee payable on that prayer being a prayer for a relief consequential to the declaration, must be calculated upon the value of the property in accordance with section 7 iv (c) of the Act. If the plaintiff is defeated he must again pay court-fees on the value of the property plus Rs. 10 for the declaration. But if the plaintiff is successful the court-fee to be paid must be regulated by a consideration of the relief sought in appeal. If the attaching creditor only appeals the relief sought is against the declaration only. The court-fee payable by him would be Rs. 10 only. If the ostensible owner appeals the court-fee payable would be the court-fee calculated on the value of the property."⁴

When therefore no summary order has been passed, which gave the cause of action, or when a summary order has been passed, but anything more

1. *Satindranath v. Siva Prasad*, (1921) 26 C.W.N. 126=64 I.C. 613.

2. *Mt. Manik v. Ramjas Agarwala*, (1923) 1 Pat. L. R. 51=70 I.C. 332.

3. (1917) 43 I.C. 971.

4. See also *Krishnaswami v. Somasundaram*, (1906) 30 Mad. 325 P.C.; *Narayana v. Ayyasami*, (1915) 39 Mad. 602.

than a mere declaration of the right denied or a mere annulment of the summary order is asked for, the suit would go out at once from the purview of Order 21 rule 63 of Civil Procedure Code and of Art. 17 cl. i of the Court-Fees Act.

These suits are of two classes: As soon as a property is attached, the person, who is aggrieved by the attachment, is not bound to go to the executing Court by a claim for a summary relief. That is only a special and cumulative remedy. He may not care for it and may at once institute a suit for the assertion of his title to the property wrongfully attached if he can do it under section 42 of the Specific Relief Act.¹ Secondly, a person whose claim is disallowed may not be content with a mere relief for a declaration and may choose to add prayers for partition, possession, injunction and the like. In these cases the scope of the suits is not identical with that declared by rule 63. The frame of such suit must satisfy the requirements of the general law such as the Specific Relief Act, and the court-fee leviable on it must be governed by the rules of the Court-Fees Act in suits for mere declaration or in suits for declaration coupled with reliefs like partition, possession or injunction.

A suit by an unsuccessful claimant of moveable property attached in execution of a decree for such property or its value is not one 'for personal property or the value of such property' within the meaning of section 6 of Act XI of 1865. It is a suit for establishment of the plaintiff's right in the sense of Order 21, rule 63, C. P. Code as the plaintiff cannot reach the property without putting out

1. *Sundar v. Ghasi*, (1896) 18 All. 410; *Raghunath v. Sarosh*, (1898) 23 Bom. 266.

of his way the order of attachment, which he could only do by establishing his right under this section. Such a suit cannot be in the Small Cause Court.¹

In *Madhusudan v. Rakhal Chander*,² it was held that "the amount which is to settle the jurisdiction of the Court is the amount which is in dispute and this latter is the amount which the execution-creditor will recover if he is successful, and the only amount which he would recover, if he is successful, will be the amount of his debt, and not the value of the property attached, unless the two amounts happen to be identical.

In *Dwarka Das v. Kameshar*,³ it was held that where the array of parties in a suit under Order 21, rule 63 is confined to the execution-creditor or his representative on the one side and the claimant or his representative on the other side, the question to be decided is whether the property is liable to attachment and sale in execution. But when in such a suit, the claimant makes the judgment-debtor or his representative a party, the property attached must be regarded as the subject-matter of his suit and the value of the suit within the meaning of sections 19 and 20 of Act XII of 1897 must be the value of the property attached, whether such value exceeds or is less than the amount sought to be realised by the sale of the property in execution of the decree.

In *Narayana v. Bhiaraj*,⁴ it was held that a

1. *Godha v. Naik Ram*, (1883) 7 All. 152 F.B. see also *Shiboo Narain v. Mudden Ally*, (1881) 7 Cal. 608; *Dakhyani Debea v. Dole Gobind*, (1893) 21 Cal. 430; *Davud Beg v. Kullappa*, (1887) 11 Mad. 264.

2. (1887) 15 Cal. 104; *Khetrapal v. Mumtaz*, (1915) 38 All. 72; *Anandi v. Ram Niranjana*, (1918) 40 All. 505.

3. (1894) 17 All. 69.

4. (1906) 2 N.L.R. 87.

suit by a defeated claimant for a declaration of his title to attached property ought for purposes of jurisdiction to be valued according to the value of the property, the subject-matter of the suit, and not according to the amount of the decree in execution of which the attachment was made, if the decree-amount is larger than the value of the property.

In a suit for a declaration by the decree-holder under this rule where it is found that there was no dispute as to title between the judgment-debtor and objector and the former was merely *pro forma* defendant, the value of the suit for purposes of jurisdiction is the amount of the decree.¹ But when the plaintiff sues for a declaration of his title to property attached in execution of a decree against another, both as against the decree-holder and the judgment-debtor the value of the suit is the value of the property.²

In dealing with the valuation of the action, the Privy Council said "The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution-debt is less than the value of the property that its amount affects the value of the suit."³

In *Nandi Kunwar v. Ram Niranjan*,⁴ it was

1. *Bhagwan v. Kanshi*, (1914) P.L.R. 253=25 I.C. 180.

2. *Sardar v. Mehrchand*, (1913) P.R. 82=18 I.C. 820; *Kallu Mal v. Shamsuddin*, (1913) P.R. 41=17 I.C. 196.

3. *Phul Kumari v. Ghanshyam Misra*, (1907) 35 Cal. 202 P.C. See also *Narayana v. Ayyasami*, (1915) 39 Mad. 602 almost holding that *Krishnasami v. Somasundaram*, (1906) 30 Mad. 335 P.C. is not good law after *Phul Kumari v. Ghanshyam Misra*, (1907) 35 Cal. 202 P.C.; *Fisher v. Arunachella*, (1908) 19 M.L.J. 236=2 I.C. 522 (not on the amount of the attachment). See also *Madukuri Ankamma v. Muvvala Subbayya*, (1918) 37 M.L.J. 611=54 I.C. 543.

4. (1918) 40 All. 505; *Khetra Pal v. Mumtaz Begam*, (1915) 38 All. 72; *Dwarka Das v. Kameshar Prasad*, (1895) 17 All. 69; *Dhan Devi v. Zamurad Begam*, (1905) 27 All. 440.

held that in a suit for a declaration that property was not liable for attachment, when the value of the property was in excess of the amount claimed in execution, the valuation of the suit was the amount due under the decree and not the value of the property. So, in a suit for a declaration that an attachment in execution of a decree against the judgment-debtor does not affect a mortgage of the property in the plaintiff's favour, where the subsistence of the mortgage is not in dispute, the proper valuation for the purpose of jurisdiction is not the value of the property but the amount for which execution is sought.¹

Summary of
the law.

Amidst this confusing mass of indefinite opinion, the following appear to be the main principles for guidance in valuation :

i. If there is no dispute as to title between the claimant and the judgment-debtor and the question involved is purely one between the claimant and the decree-holder, whether the judgment-debtor is made a party to that suit or not, the suit must be assessed on the value of the decree or the property, whichever is less.

ii. If the title of the claimant is disputed by the judgment-debtor also and the claimant seeks for a declaration against him, the suit must be assessed on the value of the property only.

iii. If the decree-holder institutes a suit for the confirmation of his attachment, then the value of the suit is the amount of the decree or the value of the property whichever is less, for the value of the action is the value to the plaintiff.

1. *Madukuri Ankamma v. Muvvala Subbayya*, (1918) 37 M.L.J. 611=54 I.C. 543, distinguishing *Fisher v. Arunachellam*, (1908) 19 M.L.J. 236=2 I.C. 522.

CHAPTER XIX

Equitable Execution

Equitable execution—Its origin—What it is—Manager under C.P. Code, 1859—Receiver under the later Codes—Forms of equitable execution—Receivers—Appointment of receivers—Considerations in appointing receivers—Property for which receivers may be appointed—Remuneration—Security—Legal status of receiver—Powers and duties—Management by Collectors—Local Government's power to make rules—Rules of procedure—Collector acting judicially—Suspension of powers of Courts—Where Court may authorise Collector to stay public sale of land—Powers of Collector—Procedure in special cases—Notice to decree-holders and claimants—Ascertainment of assets and liabilities—Notices by District Court—Effect of decision of Court—Scheme of liquidation—Recovery of balance after letting or management—Collector must render accounts to Court—Mode of sale—Restrictions on alienations—The Court of Wards Act—Injunction—Charging order—In the case of fund in Court—In the case of partnership-property—Distinction between English and Indian Law.

“Equitable execution, as its name indicates, was the creation of the Court of Chancery. Before the merger of the Courts of Common Law and Equity by the Judicature Acts, a person who had recovered at law a judgment for a sum of money, but who was precluded from reaching his debtor's property by means of a common law writ of execution, was able to obtain satisfaction of his judgment by instituting a suit in equity and obtaining therein the appointment of a receiver. The relief so afforded by the Court of Chancery was not granted haphazard, but was strictly confined to cases in which the judgment-creditor proved that he had exhausted every means of procuring satisfaction of his judgment at law, and that the debtor was possessed of some particular equitable interest which

Equitable
execution,
its origin.

could only be made available through the medium of a Court of Equity.¹ As a consequence of this rule, a judgment-creditor who sought to attach in equity some interest in land of his debtor was obliged to go through the form of suing out a writ of *elegit*, even though he was well aware that the debtor possessed nothing upon which the writ could operate.² By the Judicature Act, 1873,³ the jurisdiction of the Court of Chancery passed to the High Court of Justice,⁴ and with it, of necessity, the particular part thereof which forms the subject-matter of the present chapter. Lest, however, there should be any doubt upon this head, it is provided by Ord. XLII, r. 3, that a judgment for the recovery by or payment to any person of money, may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court, whose jurisdiction was transferred by the principal Act,⁵ might have been enforced at the time of the passing thereof. Moreover, in case anything in Ord. XLII, (the Order which deals with the subject of execution) might be deemed productive of uncertainty on this point, rule 28 thereof is to the effect that nothing in that Order is to take away or curtail any right theretofore existing to enforce or give effect to any

1. Per Jessel, M.R., *Salt v. Cooper*, 16 Ch. D. 544; and *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275. See also *Shirley v. Watts*, 3 Atk. 200; *Angell v. Draper*, 1 Vern. 398; *Curling v. Marquis Townshend*, 19 Ves. 628; *Lord Dillon v. Plaskett*, 2 Bl. N.S. 239.

2. Per Jessel, M.R., in *Anglo-Italian Bank v. Davies*, *ubi sup*; *Neate v. The Duke of Marlborough*, 3 My. & Cr. 407; *Smith v. Hurst*, 1 Coll. N.C. 705; *Messer v. Boyle*, 21 Beav. 559.

3. 36 & 37 Vict. c. 66.

4. See s. 16.

5. The Judicature Act, 1873 (36 & 37 Vict. c. 66); see R.S.C. O. LXXI r. 1.

judgment or order in any manner or against any person or property whatsoever."

"When a judgment-creditor invoked the assistance of the Court of Chancery to enable him to reach property of his debtor beyond the pale of the authority of the Courts of Common Law, that Court came to his aid by appointing a receiver on his behalf; and the High Court, in virtue of the power derived from the tribunal, awards, in the great majority of cases, equitable execution by the same means, although, as will be seen in the proper place, the receiver may now be appointed, upon a summary application, in the action in which the judgment or order to be enforced was recovered or made, without the necessity of instituting a separate action for that purpose."

What it is.

In India the Civil Procedure Code of 1859 provided for the appointment of a manager or receiver of attached property.

Manager under C. P. Code, 1859.

"When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses, or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immovable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards the payment of the amount of the decree and costs; or, when the property attached shall consist of land, if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the

land, or by letting it on lease, or by disposing by private sale of a portion of the land, or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of the judgment-debtor, to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount. In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper account of his receipts and disbursements from time to time as the Court may direct."

Receivers
under the
later Codes.

The Codes of 1877 and 1882 gave a general power for the appointment of receiver.

Where a receiver is required for the purpose not only of receiving rents and profits or of getting in outstanding property, but of carrying on or superintending a trade or business, he is usually called a manager or a receiver and manager though the terms are synonymous.¹ "The appointment of a manager implies that he has power to deal with the property over which he is appointed manager and to appropriate the proceeds in a proper manner. He is bound to carry on in accordance with the general course of business adopted by the particular trade, and is the servant and officer of the Court and must, upon any question arising as to the character or details of the management, be directed by the Court which, on appointing a manager of a business or undertaking, in effect, assumes the management into its own hands. Managers are responsible to the Court which appoints them, and no orders of any of the parties interested in the business over

1. KERR ON RECEIVERS, 246; *Orr v. Muthia*, (1898) 17 Mad. 501 (to superintend harvest and recover melvaram); *Short v. Pickering*, 1882 6 Mac. 188 (to manage a millinery shop).

which they are appointed managers can interfere with this responsibility. The Court will in no case assume the management of a business or undertaking except with a view to the winding up and sale of the business or undertaking. The management is an interim management; its necessity and its justification spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a going concern and with the sale the management ends. A manager may be appointed to carry on a private trade or business so as to wind it up for the benefit of the parties interested."¹

Until after attachment, a manager cannot be appointed and after the attachment has been made, the Court may proceed to order the sale of the property or to appoint a manager or receiver for the purpose of liquidating the debt, should that be considered to be the best course both for the creditor and for the debtor.²

The Court has full discretion to appoint a receiver and to allow a debt to be paid by degrees out of the profits of the properties, according to the circumstances of the case. It will see whether the amount due under the decree is likely to be realised within a reasonable time from the profits of the attached property, hearing the objections of the decree-holder, when he does not assent to this course.³

When an application for appointing a manager is made only to put off payment of a debt, the

1. Kerr on RECEIVERS, 246.

2. *Bunwaree v. Girdharee*, (1871) 16 W.R. 273.

3. *Din Dyal v. Ram Rattun*, (1871) 16 W.R. 46.

Court will refuse the application.¹ The appointment of a manager in another suit to satisfy that decree is no bar to a judge, on the application of another decree-holder, enquiring into the state of the property and passing proper orders, should he find that the proceeds are insufficient to satisfy all the decrees within a reasonable time, causing the decree to be executed in the usual way.² An order appointing a manager may be reviewed after some time and execution may be ordered in the usual course, if there is no possibility of satisfaction of the decree within a reasonable period.³ A period of six months was considered reasonable,⁴ and one of fifteen years or twenty years was not.⁵

Where a judgment-debtor asks for the appointment of a manager, he must show that the circumstances are such that the order for which he applied would be a reasonable and proper one. He should not only show what is the income of the particular property and the amount due under the decree, but he should also show whether that income is unencumbered and if incumbered, to what extent. He cannot ask the Court to make an order with respect to one such property before disclosing the whole state of his affairs, the extent of his liabilities and the means of meeting them.⁶ But the existence of other properties besides that attached is no ground for rejecting the application. To save a particular property from sale, a judgment-debtor

1. *Ootum v. Ram Sarun*, (1875) 23 W.R. 287.

2. *Brojender v. Kanwar*, (1864) 1 W.R. Mis. 15.

3. *Doorga Dutt v. Bunwaree*, (1876) 25 W.R. 33; *Bunwaree v. Girdharee*, (1871) 16 W.R. 273.

4. *Mohineemohun v. Ramkant*, (1871) 15 W.R. 322.

5. *Rednum v. Khaja*, (1870) 5 M.H.C.R. 272; *Mohunt Ram Rucha v. Doorga Dutt*, (1870) 13 W.R. 453.

6. *Dinobundhoo v. Macnaghten*, (1878) 2 C.L.R. 185.

must show the value and condition of other properties in his possession and the judge must consider how and by what arrangement such a disposal of different portions of such property may be made so as to avoid the sale of the property already attached.¹

The appointment of a manager does not supersede an attachment. The object of the appointment is for the protection of the estate consistently with the security of creditors and it would place the creditors in an exceedingly unsafe position if the appointment had the effect of entirely destroying that security.² It does not change the property in the subject which is attached and affected by it. The manager, appointed, so far as he is an officer of the Court, is at most the hand of the Court for the purpose of carrying out the provisions of the Code.³ The property in his hands is therefore attachable in execution of any other decree.⁴

Where a decree-holder was authorised to receive the rents of the attached property due to the debtor, the effect of the order was to constitute the decree-holder, receiver under Section 243 of Civil Procedure Code of 1859, without the direct intervention of the Court. On failure therefore of payment of rent to such decree-holder after partial satisfaction of decree, the proper course for him was to file a regular suit as receiver against the makuraridar. The attachment being alive, no limitation could apply.⁵

1. *Debkumari v. Ram Lal*, (1869) 3 B.L.R. Ap. 107.

2. *Mohabeer v. Collector of Tirhoot*, (1870) 13 W.R. 423; *Bunwari v. Mohabir*, (1872) 12 B.L.R. 297 P.C.

3. *John Tiel & Co. v. Abdool Hye*, (1873) 19 W.R. 37.

4. *Ibid.*

5. *Radha Kisshore v. Aftab Chundra*, (1881) 7 Cal. 61.

Forms of
equitable
execution.

In India the Civil Procedure Code, 1908, recognises equitable execution as a mode of execution and enacts that the Court may on the application of the decree-holder order execution of the decree "by appointing a receiver or in such other manner as the nature of the relief granted may require."¹ In appointing receivers Courts in India have precisely the same discretion as Courts in England.² In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, appoint receiver of any property and enforce the performance of his duties by attaching and selling his property.³

Receivers.

The jurisdiction to appoint a receiver by way of equitable execution is co-extensive with that existing in regard to pending actions.⁴ Under the Civil Procedure Code, 1908,

Appointment
of receivers.

(1) Where it appears to the Court to be just *and* convenient, the Court may by order—

(a) appoint a receiver of any property, whether before or after decree ;

(b) remove any person from the possession or custody of the property ;

(c) commit the same to the possession, custody or management of the receiver ;
and

(d) confer upon the receiver all such powers, as to bringing and defending suits and

1. S. 51. See also *Shunmugam v. Moidin*, (1885) 8 Mad. 229; *Fink v. Maharaj Bahadoor*, (1899) 26 Cal. 772.

2. *Ramji v. Saligram*, (1912) 14 C.W.N. 248 = 5 I.C. 96 ; *Pana Seene v. Ana*, (1910) 8 I.C. 1191.

3. C.P.C., S. 94 (d).

4. See *Edwards & Co., Ltd. v. Picard*, (1909) 2 K.B. 903 C.A.; *Aslatt v. Southampton Corporation*, (1880) 16 Ch. D. 143 ; *Holmes v. Millage*, (1893) 1 Q.B. 551 C.A.

for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.¹

In every case in which an application is made for the appointment of a receiver by way of equitable execution the Court in determining whether it is just or convenient that such appointment should be made, must have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment and may, if it shall so think fit, direct any inquiries on those or other matters before making the appointment.² The same principles will guide Indian Courts, subject to such modifications as conditions peculiar to India may suggest.³ Before appointing a receiver the Court must feel that the appointment is necessary for the protection of rights or prevention of injury,⁴ and mere convenience or absence of

Considerations
in appointing
receivers.

1. C.P.C., O. 40 r. 1; *Asadali v. Mahomed*, (1916) 43 Cal. 986.

2. Rules of Sup. Court, Or. 50 r. 15 A. *Owen v. Homan*, 4 H.L. 1032; *Raja Ram v. Sheorani*, (1910) 7 I.C. 344; *Pana Seene v. Ana*, (1910) 8 I.C. 1191; *Sant Ram v. Ramchand*, (1910) 6 I.C. 659; *Sivagnanatham v. Arunachalam*, (1911) 21 M.L.J. 821 = 11 I.C. 87.

3. *Mikanbai v. Dassimal*, (1918) 45 I.C. 224.

4. *Aslatt v. Corporation of Southampton*, (1880) 16 Ch. D. 143 (148); *Holmes v. Millage*, (1893) 1 Q.B. 551 (557).

harm will not be a sufficient ground.¹ When a decree is passed for maintenance and a charge created as securing for its payment on specified property, it is desirable in order to avoid difficulty in executing the decree and to avoid a fresh suit in default to appoint a receiver by the decree itself with directions to take possession of the property in default of payment, to sell the same and out of the proceeds to pay the allowance.² As to the person to be appointed receiver or the term of his appointment the Court has an entire discretion and the appellate Court will not lightly interfere with it.³ It is common practice in cases of a small value to appoint the judgment-creditor himself as receiver, who acts without remuneration and if the Court thinks fit without security.⁴ In England a solicitor of the Judgment-creditor is not however appointed as receiver.⁵

Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.⁶

1. *Harris v. Beauchamp*, (1894) 1 Q.B. 801; *Srimati v. Beni Madhab*, (1883) 5 All. 556.

2. *Hemanginee v. Kumode Chunder*, (1899) 26 Cal. 441; *Jubannessa v. Majdunnessa*, (1913) 17 C.W.N. 531=18 I.C. 398; *Shadi v. Anup*, (1889) 12 All. 438.

3. *Aiya Nadar v. Tenammal*, (1916) 4 L.W. 285=35 I.C. 339; *Mikanbai v. Dassimal*, (1918) 45 I.C. 224.

4. *Hewett v. Murray*, (1885) 54 L.J. Ch. 572; *Fuggle v. Bland*, (1883) 11 Q.B.D. 711; *Macnicoll v. Parnell*, (1888) 35 W.R. 773; *In re Thyyanayaki*, (1914) 25 I.C. 602.

5. See *Re Lloyd*, (1879) 12 Ch. D. 447 C.A.

6. C.P.C., O. 40 r. 5.

The appointment of a receiver is necessary where there are rights of action or equitable interests belonging to the judgment-debtor which it is desired to convert into money or when the judgment-debtor's right of property or possession is substantially disputed or when the garnishee denies his indebtedness to the debtor and interposes an adverse claim to the property, and also in any other cases in which it appears that the judgment-debtor has property or an estate or interest therein, whether legal or equitable, which ought to be applied to the satisfaction of the judgment, but which, for some reason, cannot be levied upon and sold under execution, as where he has obtained letters patent for a valuable invention or owns a seat in a stock board.¹

A receiver may be appointed of a legacy or a share of residue under a will though unascertained in amount,² of the separate estate of a married woman which she was not restrained from anticipating,³ of rents and moneys arising from land situate out of the jurisdiction,⁴ of moneys standing in another Court to which the judgment-debtor is entitled,⁵ of a bailor's interest in goods bailed, subject

Property for which receivers may be appointed.

1. FREEMAN ON EXECUTIONS, III, 2239-40.

2. *Macnicoll v. Parnell*, (1887) 35 W.R. 773; *Re Anglesey*, (1903) 2 Ch. 727.

3. *Hill v. Cooper*, (1893) 2 Q.B. 85 C.A. 20; also for income accrued due before date of judgment, *Hood Barrs v. Heriot*, (1896) A.C. 174; *Re Lumley*, (1896) 2 Ch. 690 C.A.; but not for income accrued due after date of judgment, *Bolitho & Co., v. Gidby*, (1905) A.C. 98.

4. *Mercantile Investment &c. Co., v. River Plate &c. Co.*, (1892) 2 Ch. 303; *Juggodamba v. Puddomoney*, (1875) 15 B.L.R. 318; *Jairam v. Atmaram*, (1880) 4 Bom. 482; *Lohani Bai v. Harak Chand*, (1914) 11 N.L.R. 113=13 I.C. 285; *Tikait Damodar v. Ganga Ram*, (1923) 3 Pat. 339.

5. *Westhead v. Riley*, (1883) 25 Ch. D 413.

to the bailee's lien, if any,¹ of moneys due in the case of a joint tenancy,² of the salary of a public servant actually due, but not of salary which is not due, when such salary can be assigned,³ of a pension when alienable,⁴ of a sum arising from commutation of an officer's retired pay,⁵ of the judgment-debtor's reversionary interest in the proceeds of sale of realty,⁶ when a debt is payable to two persons jointly but the beneficial interest is in the judgment-debtor,⁷ or when the garnishee denies the debt,⁸ and generally where the writ of attachment could not be served.

In the case of a contract of sale of immoveable property, a receiver may be appointed for the interest of the judgment-debtor in the contract, but the appointment may be ineffectual, if the contract is rescinded.⁹ When there is a simple trust of land for the judgment-debtor it can be reached by the ordinary process, but when there are several incumbrances of the equitable interest, the appointment of a receiver is appropriate.¹⁰

1. *Levasseur v. Mason & Barry*, (1891) 2 Q.B. 73 C.A.

2. *Hills v. Webber*, (1901) 17 T.L.R. 513 C.A.

3. *Picton v. Cullen*, (1900) 2 I.R. 612 C.A.; *Re Huggins*, (1882) 21 Ch. D. 85 C.A.; *Re Mirams*, (1891) 1 Q.B. 594; *Umbica Churn v. A.C. Meik*, (1901) 5 C.W.N. xxii.

4. *Manning v. Mullins*, (1898) 2 I.R. 34 C.A.

5. *Lucas v. Harris*, (1886) 18 Q.B.D. 127 C.A.; *Crowe v. Price*, (1889) 22 Q.B.D. 429 C.A. See also *Re Ward*, (1897) 1 Q.B. 266 C.A.

6. See *Tyrrel v. Painton*, (1895) 1 Q.B. 202 C.A.; *Ideal Bedding Co. v. Holland*, (1907) 2 Ch. 153.

7. *O'Donovan v. Goggin*, (1892) 30 L.R. Ir. 579; *Macdonald v. Tacquah Gold Mines Co.*, (1884) 13 Q.B.D. 535 C.A.; *Toolste v. Antone*, (1887) 11 Bom. 448; *Pratap v. Delhi & London Bank*, (1908) 30 All. 393.

8. *Rambutty v. Ramessur*, (1879) 22 W.R. 36; *Reazat v. Jugannath*, (1874) 21 W.R. 419; *Toolsa Goolal v. Bombay Tramway Co.*, (1887) 11 Bom. 448.

9. *Ridout v. Fowler*, (1909) 1 Ch. 658.

10. *Wells v. Kilpin*, (1874) 18 Eq. 298.

Where judgment-debtors were out of jurisdiction and it was impossible to prove the amount of debts due to them in order to found garnishee proceedings, the Court appointed a receiver by way of equitable execution.¹ If a claim is made that property has been transferred in fraud of creditors, a receiver may be appointed and the appointment cannot be assailed on the ground that the creditor can himself treat the transfer as void and by a writ in defiance of it, for the creditor is not obliged to run the risk of such levy.²

A receiver appointed in execution may sue for contribution on contract³ or for the property of the judgment-debtor.⁴

A receiver can be appointed of rents of the estate of a deceased person for the purpose of liquidating debts against that estate and there is nothing in the Code to limit the appointment of a receiver of rents to a case when the debt to be discharged is a debt against the heirs and not against the decree-holder of the estate.⁵ When the decree is against *wakf* property the only method by which the judgment-debtor may be compelled to satisfy the claim is by the appointment of a receiver. The receiver takes charge of the properties, collects the income and spends it as an officer of the Court. A portion of the income may be applied under the endowment and the rest towards the decree. The remedy of the trustee who is dispossessed by the receiver is to

1. *Goldschmidt v. Oberrheinische Metallewerke*, (1906) 1 K.B. 373 C.A.

2. *Sundaram v. Sankara*, (1886) 9 Mad. 334.

3. *Mirza Mahomed v. Widow of Balmakund*, (1874) 2 I.A. 241.

4. *Freeman on EXECUTIONS*, III. 224.

5. *Munishi Lal v. Mahomed*, (1919) 22 O.C. 94 = 52 I.C. 305.

apply to the Court for directions for the application of the income.¹

A mortgage suit does not necessarily terminate with the sale and a receiver may be appointed after the sale, pending application to set it aside.² A receiver may legally be appointed for executing a decree which is one for money only and it is not essential that the estate, the rent and profits of which are to be realised, should itself be liable to attachment in execution. It is not necessarily improper that a receiver should be appointed to deal with the rents and profits of land assigned to a Hindu widow for her maintenance, even if she has no other source of income,³ but such rents or profits of land assigned for maintenance, may not possibly be reached, when the grant for maintenance gives no saleable interest to the grantee.⁴

Where a receiver had been validly appointed on the ground that property was the subject-matter of the suit, and it afterwards turned out on appeal that the decree only operated against the defendants personally, the appellate Court has jurisdiction to maintain the receiver as a method of realising the decree amount from the judgment-debtor personally.⁵

If the creditor has abundance of property for the satisfaction of the decree, which can be reached by ordinary process of levy and sale the appointment of a receiver is clearly superfluous and will be denied. Therefore the Court should independently

1. *Syed Asad v. Wahidunessa*, (1919) 30 C.L.J. 231=57 I.C. 70.

2. *Modneshwar v. Mohcmaya*, (1911) 15 C.W.N. 672=13 C.L.J. 487=9 I.C. 1027.

3. *Lahanu v. Harakchand*, (1915) 11 N.L.R. 113=31 I.C. 285

4. See Chapter on ATTACHMENT *ante*.

5. *Ramasami v. Ramasami*, (1907) 30 Mad. 255.

exercise its discretion in appointing a receiver before the plaintiff had exhausted his remedies in ordinary process. Its action though subject to reversal on appeal is not void and the appointment cannot be assailed collaterally in an action brought by him in his official capacity.¹

Nor is it an invariable rule that for equitable execution to issue, all other remedies must be unavailable.² The several modes prescribed in the Code of Civil Procedure for execution of decrees are not exclusive of each other.³ The fact that there is other property of the judgment-debtor which may be taken in legal execution need not deter the court from granting equitable execution against property which cannot be reached by legal execution,⁴ though as a general rule a receiver will not be appointed if a method of legal execution is available.⁵ When the mortgagee has other properties to proceed against for the realisation of his decree, the mere fact that one of the properties became unsaleable or the properties would not fetch so much by forced sale is no ground for appointing a receiver for the profits of such unsaleable property⁶ and not at all for other property of the judgment-debtor.⁷

1. FREEMAN ON EXECUTIONS, III, 2241. See *Edwards v. Edwards*, (1876) 2 Ch. 291; *Bhairabchandra v. Nandiram*, (1917) 46 Cal. 70; *Santram v. Ramchand*, (1910) 6 I.C. 559. See also *Nawab Mirza v. Amer Chand*, (1914) 16 O.C. 238=21 I.C. 283.

2. *Hills v. Webber*, (1901) 17 T.L.R. 513 C.A.

3. S. 51.

4. *Willis v. Cooper*, (1900) 44 Sol. Jo. 638.

5. *Harris v. Beuchamp Bros.*, (1894) 1 U.B. 801 C.A.; *Holmes v. Millage*, (1893) 1 Q.B. 551 C.A.; *Edward & Co. Ltd. v. Picard*; (1909) 2 K.B. 902 C.A.; *Smith v. Cowel*, (1873) 6 Q.B.D. 78; *Manchester &c District Bank v. Parkinson*, (1889) 22 Q.B.D. 173.

6. *Muhammad v. Amarchand*, (1913) 16 O.C. 238=21 I.C. 283; *Latafut v. Anunt*, (1896) 23 Cal. 517.

7. *Ibid.* See *Kartic Nath v. Purnanand*, (1885) 11 Cal. 496; *Yeshwant v. Shankar*, (1892) 17 Bom. 388.

But when it appeared that the mortgage decree was an old one and nothing had been paid since the decree and that the mortgaged properties did not afford sufficient security, a receiver was appointed.¹

Where a decree is passed for sale on a simple mortgage the court has power to appoint a receiver, though the personal remedy is barred by limitation and the fact that the mortgage being a simple one would not entitle the mortgagee to the possession of the property and its profits is not in law a bar to the appointment.²

A receiver will not be appointed of untaxed costs,³ of future earnings,⁴ of future allowance of maintenance,⁵ of sums payable purely at the pleasure of another person,⁶ of the judgment-debtor's property generally,⁷ or of objects that are exempted from attachment under the C. P. Code.⁸

Where the judgment-creditor has commenced an action to administer the debtor's estate,⁹ or where the amount of the debt is so small as not to

1. *Beni Madho v. Pransingh*, (1912) 15 C.L.J. 187=14 I.C. 456.

2. *Venkataramajagopala v. Basivi*, (1914) 29 M.L.J. 457=26 I.C. 986.

3. *Willis v. Cooper*, (1900) 44 Sol. Jo. 698

4. *Holmes v. Millage*, (1893) 1 Q.B. 551 C.A. (earnings of a journalist); *Hamilton v. Brogden*, (1891) W.N. 36 (director's fees); *Cadogan v. Lyric Theatre Ltd.*, (1894) 3 Ch. 338 C.A. (Takings of a theatre); *Asad Ali v. Haider Ali*, (1911) 38 Cal. 13; *Ranee Annappurni v. Swaminatha*, (1911) 34 Mad. 7.

5. *Palikandy v. Krishnan*, (1917), 40 Mad. 302; *Padmanand v. Ramaprasad*, (1912) 17 C.W.N. 602=17 I.C. 284; *Ramdhan v. Koilasnath*, (1869) 4 B.L.R.A.C. 20.

6. *R. v. Lincolnshire County Court Judge*, (1887) 20 Q.B.D. 167.

7. *Hamilton v. Brogden*, (1891) W.N. 14.

8. S. 60.

9. *Re Cave* (1892) W.N. 142 C.A.; but see *Waddell v. Waddell*, (1892) P. 226.

warrant the expense of an appointment,¹ an order will not be made.

The appointment of a person as receiver of the property in regard to which no litigation is pending in the form of a suit or of execution proceedings is entirely without jurisdiction.² A receiver will not be appointed over another receiver, the proper order in such case would be to extend the power of the receiver already appointed.³

A forfeiture clause in a will to take effect when a life interest should 'belong to or become vested in any person other than the life tenant' does not take effect merely because a receiver of that interest is appointed with a direction to pay the income in or towards satisfaction of a judgment and costs.⁴

One, J. L. being the mortgagee of a cotton ginning factory, obtained a decree for sale on his mortgage, but instead of the factory being sold in execution of this decree, a receiver was appointed for the period of one year by consent of the decree-holder. The receiver was to work the factory, receive the profits and hand them over to the decree-holder. Notwithstanding that no fresh order was passed by the executing court, the receiver remained in possession of the factory for more than two years. He received the profits, but in accordance with the local practice of the trade made them

1. *I. v. K.* (1884) W.N. 63.

2. *Chandeshwar v. Bisheswar*, (1920) Pat. 231; *Marulasidda v. Siddalinga*, (1910) 7 I.C. 16.

3. *Valle v. O'Reilly*, (1824) 1 Hog. 199. See *Munshi Lal v. Mahomed*, (1919) 22 O.C. 194=52 I.C. 305.

4. *In re Beaumont*, (1910) 103 L.T. 124; *In re Patts*, (1893) 1 Q.B. 648 (661). *Semble*, that if a creditor, being appointed receiver in person had collected and retained money under the order, the forfeiture clause might have taken effect.

over to a certain association for the collection and distribution of the profits of cotton-ginning factories. Meanwhile the mortgagor became insolvent, and creditors holding simple money decrees against him proceeded to attach the profits of the factory in the hands of the association, and the profits were divided rateably between these creditors. The mortgagee then sued to recover the profits of the factory earned whilst the receiver had been in charge, making defendants, the receiver originally appointed by the Court, the creditors of the insolvent mortgagor and the receiver in insolvency. It was held that the appointment of the original receiver having been made with the consent of the decree-holder and the judgment-debtor was not made without jurisdiction, that the profits of the factory for the year for which the receiver was appointed were assignable entirely to the satisfaction of the mortgage decree, and that the suit as against the receiver in insolvency was not barred by either section 16 or section 22 of the Provincial Insolvency Act, 1907.¹

An assignee for value of a debt has priority over a person who subsequently obtains an order for a receiver by way of equitable execution over such debt, although such order was obtained before notice given to the debtor.²

A receiver is an officer of the Court and the fund in his hands comes within Or. 21 r. 52.³ No attachment can be made of such fund, without the

1. *Jhunkoo Lal v. Peary Lal*, (1917) 39 All. 204, distinguishing. *In re Patts*, (1893) 1 Q.B. 648 (661) and *Croshaw v. Lyndhurst Ship Co.*, (1897) 2 Ch. 154.

2. *Re Bristow*, (1906) 2 I.R. 215.

3. See *Brereton v. Edwards*, (1888) 21 Q. B. D. 226; *Re Cardus*, (1888) W.N. 17; *Rani Debendra Bala v. Babu Chandrasekhar*, (1916) 1 Pat. L.J. 449=35 I.C. 589.

previous leave of Court, and if made cannot be recognised by the Court¹; nor can attachment be made in anticipation of money expected to reach the receiver's hands for the attachment will apply only to money actually in his hands.² The rule that the position of a receiver may not be disturbed without leave, does not apply, so far as a third person is concerned until a receiver is actually appointed and is in possession. Until the appointment has been perfected and the receiver is in actual possession, a creditor is not debarred from proceeding to execution.³ Property in the hands of a receiver is exempt from judicial process and the purchaser of such property at an execution sale buys at his peril, for the sale made under an execution issued by another Court, when the property is in the hands of a receiver appointed by a Court, may be cancelled by an appropriate process.⁴

The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.⁵ Remuneration.

Every receiver so appointed shall—

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property : Security.

1. *Mahammed v. Mahommed*, (1894) 21 Cal. 85; *Khan v. Alli*, (1892) 16 Bom. 577; *Saratchandra v. Apurvashara*, (1911) 15 W.N. 925=11 I.C. 187 (leave may be obtained after the attachment of money in the hands of receiver.)

2. *Tulasi v. Balabhai*, (1898) 22 Bom. 39; *Tiruvengadiah v. Thrivengadiah*, (1914) 26 M.L.J. 364=24 I.C. 617; see also *Umabai v. Amirtrao*, (1914) 39 Bom. 80 (85).

3. *Kanailal v. Manoo Bai*, (1919) 23 C.W.N. 952=51 I.C. 394.

4. *Livinia Ashton v. Madabmoni Dasi*, (1910) 11 C.L.J. 489=5 I.C. 390.

5. C.P.C., O. 40 r. 2.

- (b) submit his accounts at such periods and in such form as the Court directs :
- (c) pay the amount due from him as the Court directs ; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.¹

Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or,
- (b) fails to pay the amount due from him as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.²

In cases in which a receiver, appointed at the instance of the judgment-creditor, misappropriated money collected by him, the decree is not satisfied *pro tanto*, but the estate must bear the loss, as between the parties to the suit, the receiver's liability notwithstanding.³

The receiver's title is not complete until he has given the security, if any, ordered by the Court,⁴

1. *Ibid.* 3.

2. *Ibid.* 4.

3. *Orr v. Muthiah*, (1893) 17 Mad. 501, affirmed (1897) 20 Mad. 224 F.B.

4. *Edwards v. Edwards*, (1876) 2 Ch. D. 291 C.A. ; *Redout v. Fowler*, (1904) 2 Ch. 93 C.A. ; *Srinivasa v. Keshoprasad*, (1911) 14 C.L.J. 489=12 I.C. 745.

but when security is given, his title relates back to the date of his appointment.¹ The title of a judgment-creditor to money or goods in the hands of a receiver accrues from the date of the order of appointment.² An order appointing a receiver in execution has priority over a subsequent charging order.³

Where by consent of parties a person is appointed receiver to take charge of certain properties in the execution of a decree, if the creditor asks for the discharge of the receiver and the application is refused, the order is one relating to execution within the meaning of S. 47 and is appealable.⁴ An appeal lies from an order granting or refusing the appointment of a receiver,⁵ but not to the Privy Council.⁶ Where a receiver is appointed in a suit by A against B of B's properties and C, claiming to be in possession of the properties under an agreement with B, objects to the appointment of the receiver and his objection is disallowed, the order is appealable, though C is not a party to the suit.⁷ According to the High Court of Madras,⁸ an order that a receiver be appointed without naming the receiver and adjourning the application for appointing a person as the receiver, is appealable,

1. *Levasseur v. Mason & Barry*, (1891) 2 Q.B. 73 (80) C.A.

2. *Ibid.*

3. *Re Anglesey*, (1903) 2 Ch. 727.

4. *Rameshwar v. Hitendra*, (1918) 3 Pat. L.J. 513=46 I.C. 655.

5. C.P.C., O. 43 r. 1 (s). *Muni Lal v. Jagannath*, (1916) 33 I.C. 735; *Khagendra v. Shashaddhar*, (1904) 31 Cal. 495; *Cursetji v. Gangaram*, (1915) 17 Bom. L.R. 680=30 I.C. 545.

6. *Chandi Dutt v. Pudmanund*, (1895) 22 Cal. 928.

7. *Hudson v. Morgan*, (1909) 36 Cal. 713; *Agabeg v. Sundari*, (1918) 3 Pat. L.J. 573=48 I.C. 133. See also *Inder Deo v. Gawri Shankar*, (1918) Pat. 138=45 I.C. 177.

8. *Palniappa v. Palniappa*, (1916) 40 Mad. 18.

but according to the High Courts of Calcutta, Bombay and Allahabad,¹ it is not. No appeal lies from an order of Court granting directions in passing receiver's accounts,² or from an order declaring the receiver liable in respect of a sum of money, unless the order includes a direction for the attachment of his property.³

Execution of
decrees by
Collector.

“The Local Government may, with the previous sanction of the Governor-General in Council, declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.”⁴

1. “The Local Government may make rules consistent with the aforesaid provisions :—

Rules of
procedure.

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same and for retransmitting the decree from the Collector to the Court ;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the

1. *Ramji v. Koman*, (1914) 13 A.L.J. 79=27 I.C. 646 ; *Narbadashanker v. Kernaldas*, (1916) 17 Bom. L.R. 510=29 I.C. 504 ; *Upendra v. Bhupendra*, (1910) 13 C.L.J. 157=9 I.C. 582.

2. *Keshobati v. McGregor*, (1908) 35 Cal. 568.

3. *Ganesh Lal v. Kumar*, (1919) 4 Pat. L.J. 636=54 I.C. 207.

4. *Ibid.* S. 68.

decree if the execution thereof had not been transferred to the Collector ;

- (c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

2. A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exerciseable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.”¹

“In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.”²

Collector
acting
judicially.

A notification by the Local Government that in any local area, the execution of decrees shall be transferred to the Collector ousts the jurisdiction of the Civil Courts so far as regards the execution of decrees,³ so that after such notification, the Court

1. C.P.C., S. 70 (=Old Code, S. 320). See *Farhat-un-nissa v. Sundari Prasad*, (1920) 18 A.L.J. 124=54 I.C. 801

2. C.P.C., S. 71 [=Old Code, S. 320 (5).]

3. *Sukhdeo v. Sheo Ghulam*, (1882) 4 All. 382 ; *Hardeo v. Musammatt Narbadi*, (1909) 5 N.L.R. 121=3 I.C. 572 ; *Janardhan v. Ramchandra*, (1918) 46 I.C. 885.

transferring the decree has no power to give leave to the decree-holder to bid,¹ or to postpone the sale,² or even to record satisfaction of the decree.³

But it is doubtful if a Court can recall a case sent up to the Collector.⁴ But the payment of the proceeds of a decree is entirely within the jurisdiction of the Court which orders execution. So in the case of a decree transferred for execution to the Collector, the Collector holds the proceeds in execution thereof at the disposal of the Court and is bound to distribute the money in accordance with any order for rateable distribution passed by that Court.⁵

These sections take away the jurisdiction only of the Court which transmitted the decree for execution, and not of any other Court.⁶

Any order made by the Collector, if *ultra vires*, is liable to be set aside by a regular suit.⁷ Therefore, in the absence of a rule by the Local Government empowering the Collector to set aside a sale under Order 21 rule 89 or rule 90 or on the ground of fraud,⁸ the auction-purchaser can institute a suit for a declaration that the sale was valid and that the order setting it aside is inopera-

1. *Shriniwas v. Jagadevappa*, (1918) 42 Bom. 621.

2. *Daulat v. Jugal Kishore*, (1900) 22 All. 108.

3. *Muhammad v. Payag*, (1894) 16 All. 228; *Khusalchand v. Nandram*, (1911) 35 Bom. 516.

4. *Mahadaji v. Hari*, (1883) 7 Bom. 332; *Hargovan v. Hira*, (1884) 8 Bom. 301; *Madho Prasad v. Hansa*, (1883) 5 All. 314.

5. *Tapesri Lal v. Deokinandan*, (1893) 16 All. 1.

6. *Shiam Behari v. Rup Kishore*, (1898) 20 All. 379.

7. *Ganpatram v. Isaac*, (1891) 15 Bom. 322; *Bai Amthi v. Madhav*, (1891) 15 Bom. 694; *Mathuradas v. Panhalal*, (1894) 19 Bom. 216; *Narayan v. Rasulkhan*, (1899) 23 Bom. 531; *Pita v. Chunilal*, (1907) 31 Bom. 207; *Sheo Prasad v. Muhammad*, (1893) 25 All. 167. See also *Mathuji v. Kondaji*, (1905) 7 Bom. L.R. 263.

8. *Sadho v. Abhenandan*, (1904) 26 All. 101.

tive.¹ But the Collector can always cancel his own order of postponement of the sale.² The Court, from which a decree has been transferred to the Collector for execution, can therewith also exercise its powers to set aside sale on the ground of deposit, fraud or material irregularity, or want of saleable interest, though the Collector has no such power unless it is specially conferred on him by the rules.³ Likewise has the Court the power to restore an applicant to possession under Order 21 rule 101, from which he has been ousted by the order of the Collector, for obstructing delivery to a purchaser at the Collector's sale.⁴ It is provided specifically that an appeal from the order of the Collector shall lie to such authorities as the Local Government may by rules prescribe and in the absence of rules prescribing an appeal to the High Court no appeal to the High Court lies.⁵ Nor is an order made by the Collector sanctioning prosecution of a party under section 476 Cr. P. Code subject to the revision by the High Court, as it is an order passed by him as a Revenue Court.⁶

"Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector

Where Court may authorise Collector to stay public sale of land.

1. See also *Shiam Behari v. Rup Kishore*, (1898) 20 All. 379.

2. *Wazir Ali v. Janki Prasad*, (1906) 28 All. 671.

3. *Pita v. Chunilal*, (1906) 31 Bom. 207. See *Shantmurti v. Narayana*, (1922) 45 Bom. 1132.

4. *Arjun v. Krishnaji*, (1913) 38 Bom. 673.

5. *Mancherji v. Thakurdas*, (1905) 7 Bom. L.R. 682.

6. *Emp. v. Asharfi Lal*, (1917) 39 All. 91; *Emp. v. Bhajan*, (1915) 37 All. 334.

to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share. In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable."¹

This section does not require the Collector to submit a detailed scheme when he makes a representation to prevent a sale, and the Court should give the Collector an authority in general terms.² The scheme for satisfaction of the decree proposed by the Collector must provide for such satisfaction within a reasonable period by the temporary alienation or management of the land, and when the Collector does not submit the scheme the Court ought to pass orders for the sale.³

Under this section the Collector has power to make a proposal for temporary alienation of land notwithstanding the provisions of section 16 of the Punjab Alienation of Land Act.⁴ For sale of revenue-paying land, sanction of revenue authority is unnecessary.⁵ The Court is not bound to accept the Collector's recommendation which is purely an administrative function,⁶ much less in deference to the opinion of a superior judge who forwards the

1. C.P.C., S. 72 (=Old Code, S. 326). See *Ram Rattan v. Datar Kuar*, (1919) 52 I.C. 356.

2. *Darya Singh v. Mahtab*, (1894) P.R. 25

3. *Jai Bhagwan v. Buali Baksh*, (1906) P.R. 63.

4. *Saleh Mahomed v. Mehar Singh*, (1919) P.R. 1=51 I.C. 399; *Sain Ditta v. Nur Ahmed*, (1934) 4 Lah. L. J. 476=74 I.C. 194.

5. *Barkat Rai v. Misri Khan*, (1918) P.L.R. 69=46 I.C. 864; *Lala Kishore v. Ishar Singh*, (1913) P.R. 89=19 I.C. 479.

6. *Huro Prosad v. Kali Prasad*, (1882) 9 Cal. 290; *Sardarni v. Ram Rattan*, (1920) 1 Lah. 192; *Gurandittamal v. Rustomji*, (1915) P.L.R. 9=27 I.C. 630.

Collector's recommendation.¹ But before accepting the Collector's views, the Court is bound to hear any objections adduced by the decree-holder.²

"Where the execution of a decree has been transferred to the Collector under section 68, he may (a) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging the whole or any part of the property ordered to be sold; or (c) sell the property ordered to be sold or so much thereof as may be necessary."³

Powers of
Collector.

After a Civil Court passes a decree for joint possession of a revenue-paying estate, the Collector not only has to make allotment but to complete the partition by delivery of possession and he fails to exercise a jurisdiction vested in him by law if he refers the parties to the Civil Court for this purpose. After allotment the parties cannot claim to be joint owners of the property though the partition proceedings are not completed according to law.⁴

When a decree is transferred to the Collector for execution he can send back the papers, if he fails in effecting a sale of the property. For good reasons the Court which passed the decree can also send back the papers to the Collector without a fresh

1. *Muttra Pershad v. Ram Pershad*, (1873) 6 N.W.P. 39; *Huro Prosad v. Kali Prosad*, (1882) 9 Cal. 290.

2. *Huro Prosad v. Kali Prosad*, (1882) 9 Cal. 290.

3. C.P.C., Sch. III, r. 1 (=Old Code, S. 321). The proceedings in these rules are in the nature of quasi-insolvency proceedings, *W. H. Peachy v. Bishen Das*, (1903) P.L.R. 61.

4. *Munwar Ali v. Taiyabali*, (1920) 56 I.C. 80 6.

application for execution. In this case the Court enforces what it has already ordered.¹

Procedure in
special cases.

“ Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.”²

Notice to
decree-holders
and claimants.

“ (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

- (a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;

1. *Satgur Prasad v. Raj Kishore Lal*, (1920) 42 All. 152.

2. C.P.C., Sch. III, r. 2 (=Old Code, S. 322).

- (b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise."¹

Where the Collector acting under this provision called upon every person who had a claim on the property of the judgment-debtor to submit a statement thereof and in pursuance of the authority vested in him satisfied the claims made, it was not competent to a person who had not made the statement required to claim to set aside the arrangement made by the Collector.²

"(1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from time to time adjourn such hearing and inquiry.

Ascertainment
of assets and
liabilities.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any

1. C.P.C., Sch. III, r. 3 (=Old Code, S. 322 A).

2. *Mahamed Serajuddin v. Mt. Atam Bi*, (1889) 4 C. P. L. R. 118.

of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.”¹

Notices by
District
Court.

“ The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.”²

1. C.P.C., Sch. III, r. 4 (= Old Code, S. 322 B). See *Girdhar Das v. Collector of Ghasipur*, (1896) A.W.N. 69.

2. *Ibid.*, r. 5 (= Old Code, S. 322 C).

“The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree.”¹

Effect of
decision of
Court.

“(1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may—

Scheme of
liquidation.

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property ; or

(b) if it appears that the amount with interest (if any) in accordance with the decree, and when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property ; or

(ii) by mortgaging the whole or any part of such property ; or

(iii) by selling part of such property ; or

(iv) by letting on farm, or managing by himself or another the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or

(v) partly by one of such modes, and partly by another or others of such modes.

1. C.P.C., Sch. III, r. 6 (=Old Code, S. 322 D).

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government."¹

Under clause (1) (b) aforesaid, the Collector has to take into account the whole decretal amount with interest. That includes not merely interest up to the date of the application but also interest which runs according to the decree up to the date of payment, in spite of an omission by the decree-holder

1. C.P.C , Sch. III, r. 7 (=Old Code, S. 323).

to mention in his application the claim for further interest. The Collector cannot return the decree as satisfied till the whole amount including interest up to the date of satisfaction has been paid.¹

“Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realised, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.”²

Recovery of
balance after
letting or
management.

“(1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.”³

Collector to
render
accounts to
Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

1. *Bhurchand Hanoraj v. Vira Champa*, (1913) 37 Bom. 32.

2. C.P.C., Sch. III, r. 8 (= Old Code, S. 324).

3. *Jugraj v. Kissan Singh*, (1888) 3 C.P.L.R. 147.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct; or

(c) where the Collector has proceeded under paragraph 2,—

(i) in keeping down the interest on incumbrances on the property;

(ii) Where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(iii) in discharging rateably the claims of original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

4. No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judg-

ment-debtor or such other person as the Court directs.”¹

The Collector, though he is bound to render accounts to the Court, cannot be compelled to give up the account books, nor is he bound to deposit the balance, if any, in Court.²

“Where the Collector sells any property under this schedule he shall put it up to public auction in one or more lots, as he thinks fit, and may—

Mode of sale.

(a) fix a reasonable reserved price for each lot;

(b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(c) buy in the property offered for sale, and re-sell the same by public auction or private contract as he thinks fit.”³

“(1) So long as the Collector can exercise or perform in respect of the judgment-debtor’s immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

Restrictions on alienations.

(2) During the same period no Civil Court shall issue any process of execution either against

1. C.P.C., Sch. III, r. 9 (=Old Code, S. 324 A).

2. *Rupali v. Kalyan*, (1904) 6 Bom. L R. 825.

3. C.P.C., Sch. III, r. 10 (=Old Code, S. 325).

the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived."¹

"Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct."²

"In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents."³

It is the business of the Collector to provide for the satisfaction of the decree and during the period of his management, no execution can issue against the property under his control.⁴ But he has no jurisdiction to determine whether the decree is satisfied or not.⁵ The Collector's powers under Para 11 do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. They exist at least till the con-

1. C.P.C., Sch. III, r. 11 (=Old Code, S. 325 A).

2. *Ibid.*, r. 12 (=Old Code, S. 325 B).

3. *Ibid.*, r. 13 (=Old Code, S. 325 C).

4. *Girdhar v. Har Shankar*, (1898) 20 All. 383. See also *Farhat-un nissa v. Sundari*, (1920) 18 A.L.J. 124=54 I.C. 801.

5. *Bhurchand v. Virachampakachar*, (1913) 37 Bom. 32.

firmation of the sale.¹ If an objection has been raised as to a sale by a Collector, his powers to confirm the sale are suspended and he must refer the objector to the Civil Court. A purchaser's suit to establish his title to the property sold is not barred by S. 47 of the Code.²

The object of Sch. III, para 11 is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object, for by such attachment alone the property is not exposed to the risk of such loss. Attachment before judgment is not a process in execution of a decree, for at the time of attachment there is no decree and no process that could be issued in execution of the same and consequently an attachment before judgment is not prohibited by Sch. III, para 11 C. P. Code.³

An alienation by the judgment-debtor during the management of the Collector without his consent is absolutely void, and not merely as against the Collector and those claiming under him,⁴ though that consent may validly be signified even after the execution of the deed, but before its registration.⁵ If the alienation during such period by the judgment-debtor is invalid the alienee cannot get posses-

1. *Mahdeo v. Krishnaji*, (1921) 16 N.L.R. 194=60 I.C. 310.

2. *Balwant Dass v. Umabai Shankar Rao*, (1921) 45 Bom. 812.

3. *Bansilal v. Sitaram*, (1922) Nag. 233=68 I.C. 188.

4. *Gauri Shankar v. Chinnuniya*, (1918) 46 Cal. 183 P.C.; *Murray v. Murat Singh*, (1908) 3 N.L.R. 171; *Chandan Lal v. Muhammad Hussain*, (1899) P.R. 42; *Motiram v. Asaram*, (1919) 53 I.C. 776 (transferer himself can question it). The contrary view taken in *Magniram v. Bakubai*, (1912) 36 Bom. 510 and *Ganga Prasad v. Ganga Baksh*, (1907) 29 All. 415 is no longer law.

5. *Parwat v. Ramji*, (1918) 45 I.C. 240.

sion, though he may be entitled to damages.¹ While a decree is under execution by the Collector it is illegal for a Civil Court to issue process against the property and this illegality is not cured by the mere fact that subsequently the Collector ceased to have charge of the execution-proceedings. The permission of the Collector for a mortgage by the judgment-debtor need not take the form of a certificate under O. 21, R. 83 C. P. Code. It is enough if the Collector knows of the mortgage and gives sanction to it in writing.²

The word 'incompetent' in the section is to be read in the exact and plain sense that the word implies.³ The incompetency does not extend to the lessee from the Collector. An alienation by such lessee would be binding upon him for the term of the lease even though the lease may contain conditions making the transfer voidable at the instance of the lessor. The alienation contemplated is one intended to take effect at once and does not include a testamentary disposition.⁴ A party seeking to avoid the alienation must show that on the date of transfer the Collector was exercising powers under the Code and the decree was still unsatisfied. The incompetency under the section relates to the period during which the Collector is executing the decree. If by lease of property he has satisfied the decretal amount, the judgment-debtor may sell the property subject to the lease.⁵

1. *Seth Jaidayal v. Ram Sahae*, (1889) 17 Cal. 432.

2. *Sheikh Mahomed Muzaffar Ali v. Bhagwati Prasad Singh*, (1922) 8 O.L.J. 358=66 I.C. 642.

3. *Gauri Shankar v. Chinnumiya*, (1918) 46 Cal 183 P.C.; *Motiram v. Ram Gopal*, (1919) 53 I.C. 776.

4. *Muhammad Sayed v. Muhammad Ismail*, (1911) 33 All. 233.

5. *Sonba v. Ganesha*, (1912) 8 N.L.R. 182=17 I.C. 887.

But when once the decree-holder intimates to the Collector that his decree has been satisfied by the judgment-debtor, the Collector's powers cease, because the very foundation of them consisting in the fact of a decree which is alive and capable of execution has disappeared and after such adjustment is certified, any alienation made is not invalid.¹

If during the pendency of execution before the Collector, the judgment-debtor sold his property privately and the purchaser having satisfied the decree put in a petition for satisfaction in the Civil Court, but the Collector sold the property subsequently, the remedy of the private purchaser is to apply to set aside the sale under section 47 C. P. Code and not to institute a separate suit and that application is to be made to the Civil Court and not to the Collector.²

The period during which the property is under the Collector should be excluded from the period of limitation applicable to proceedings in execution.³ The period during which execution proceedings are pending before the Collector can be excluded only in cases where a provision has been made under Sch. III, para 7, for the satisfaction of the decree and where the decree-holder has in consequence been temporarily deprived of his remedy. Where no such provision is made for the payment of a decree, the mere fact that the Collector is taking steps to satisfy another decree-holder who had attached the same property is no ground for exclud-

1. *Kushalchand v. Nandram*, (1911) 35 Bom. 516.

2. *Sadho Chaudhri v. Abhenandan*, (1903) 26 All. 101.

3. *Girdhar Das v. Har Shankar*, (1898) 20 All. 383; *Shyam Kdaran v. The Collector of Benares*, (1919) 17 A.L.J. 1140 = 52 I.C. 742.

ing time.¹ The words "period of limitation" in para 11 (3) apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Act and S. 48, C. P. Code.²

The Court of
Wards Act.

The Madras Courts of Wards Act³ enacts :

"(1) In the case of any specified ward of the Court, the Local Government may, with the previous sanction of the Governor General in Council, declare by notification in the official Gazette that execution of decrees passed by Civil Courts, which are capable of execution by sale of any immoveable property of such ward, or which in pursuance of a contract specifically affecting any such immoveable property order the sale of the same, whether such decrees be passed prior to such notification or subsequent thereto, shall be transferred to the Collector of the district in which such property or any portion thereof is situate and rescind such notification: Provided that when a portion only of a decree passed by a Civil Court is of the description aforesaid, such portion alone shall be transmitted to the Collector for execution.

(2) The Local Government may also notwithstanding anything contained in the Code of Civil

1. *Bhaurao v. Lahanu*, (1921) 64 I.C. 855.

2. *Mohammad Abdul Karim v. Nawal Singh*, (1910) 13 O.C. 303=8 I.C. 377; *Shyam Karan v. The Collector of Benares*, (1919) 42 All. 118; see Vol. I. 384, 482.

3. Madras Act I of 1902, ss. 45-47. See also Bengal Court of Wards Act (IX of 1879); *Umakanta Sen v. Hiralal Roy*, (1916) 20 C.W.N. 852=34 I.C. 86; Bombay Court of Wards Act (I of 1905); Punjab Court of Wards Act (II of 1903), Ss. 26, 31; *Balwant Singh v. Mahindar Singh*, (1914) P.W.R. 23=49 I.C. 476; *Dy. Commissioner, Amritsar v. Ballamal*, (1914) P.R. 3=58 I.C. 635; *Dy. Commissioner, Amritsar v. Mahindar Singh*, (1914) P.R. 2=58 I.C. 631; U. P. Court of Wards Act (III of 1899); *Lal Singh v. Collector of Etah*, (1914) 36 All. 331; *Muazzam Ali v. Churni Lal*, (1911) 33 All. 791; *Sanktha Prasad v. Raja Krishna Dat*, (1914) 25 I.C. 668.

Procedure prescribe rules for the transmission of the decree from the Civil Court to the Collector, and for regulating the procedure of the Collector in executing the same, and for re-transmitting the decree from the Collector to the Civil Court.

(3) Rules under this section may confer upon the Collector or any gazetted subordinate of the Collector all or any of the powers which a Civil Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector, including the powers of the Civil Court under sections 294 and 312 of the Code of Civil Procedure and may provide for orders passed by the Collector or any gazetted subordinate of the Collector or orders passed on appeal with respect to such orders, being subject to appeal to and revision by superior revenue authorities as nearly as may be as the orders passed by the Civil Court, or orders passed on appeal with respect to such orders, would be subject to appeal to and revision by appellate or revisional civil Courts under the Code of Civil Procedure or other law for the time being in force if the decree had not been transferred to the Collector.

(4) A power conferred by the rules upon the Collector, or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exerciseable by the civil Court which passed the transferred decree or by any civil Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the aforesaid civil Court.

(5) In executing a decree transferred to the Collector under this section the Collector shall be

deemed to be acting judicially within the meaning of the Judicial Officers Protection Act, 1850."

"When the Collector, to whom the execution of any decree has been transferred under section 45, is also the Collector who has to discharge the other functions of a Collector under this Act in respect of the ward against whom such decree has to be executed, the Local Government shall appoint some other person by name or virtue of his office to exercise the functions of a Collector under this Act in respect of such ward other than the execution of the decrees transferred to him.

The Board of Revenue may authorize the person so appointed to exercise all or any of the powers conferred on a revenue-officer in charge of a division by sub-section (2) of section 16 of the Madras Proprietary Estates' Village Service Act 1894.

The provisions of sections 321, 322, 322A, 322B, 322C, 322D, 323, 324, 324A, 325, 325A, 325C of the Code of Civil Procedure, shall, subject to the provisions of this Act and to such rules as may be prescribed by the Local Government under section 45, be applicable as far as may be to the execution of decrees transferred under section 45."¹

Injunction.

An injunction may be granted in aid of equitable execution.² An injunction will be granted to restrain a divorced husband, against whom an order for alimony has been passed, from advancing marriage settlement fund in favour of children,³ to

1. *Umade Rajah v. Ranga Bhupala*, (1910) 21 M. L. J. 464 = 7 I.C. 860.

2. *Thornton v. Finch*, (1864) 4 Giff. 515.

3. *Oliver v. Lowther*, (1880) 28 W.R. 381 ; *Gillet v. Gillet*, (1889) 14 P.D. 158.

restrain payment of legacy to husband in a claim against him for maintenance,¹ and to restrain the judgment-debtor from recovering costs payable to him out of fund in Court.² An ex parte injunction restraining any dealing with the property may be granted until the return of notice ordered on the application for the appointment of a receiver, but not in the absence of proof of danger that the property will be made away with by the judgment-debtor.³

A charging order is a mode of equitable execution. It is the method by which stocks or shares or fund in Court are made available to satisfy a judgment or order under the Judgments Act, 1838. If the judgment-debtor has any joint stock, funds or annuities or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right or in the name of any person in trust for him, the Court may on the application of a judgment-creditor order that such stock, funds, annuities or shares or such of them or such part thereof respectively as he thinks fit, shall stand charged with the payment of the amount due or to become due under the judgment or order and interest thereon.⁴

Charging
order.

In England charging orders therefore rank *inter se* in priority according to the dates of the respective orders *nisi*.⁵ The charging order when made confers upon the judgment-creditor the same

1. *Archer v. Archer*, (1886) W.N. 66; *Bullus v. Bullus*, (1910) 102 L.T. 329.

2. *Westhead v. Riley*, (1883) 25 Ch. D. 413.

3. *Lloyds' Bank Ltd. v. Medway Upper Navigation Co.*, (1905) 2 K.B. 359 C.A.

4. 1 and 2 Vict. c. 110, S. 14; R.S.C., O. 46.

5. 1 and 2 Vict. c. 110, S. 14.

remedies, as if the judgment-debtor has made a valid and effective charge in favour of the judgment-creditor,¹ but a judgment-creditor cannot by obtaining a charging order on a fund in Court acquire priority over a previous mortgagee of the fund who has obtained no order.² When there are several creditors they will rank in the same order as any other incumbrancers of a fund.³

Attachment
of fund in
Court.

This provision is not copied in India. "Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued; Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court."⁴

That is, the property is attached and must be held subject to the further orders of the Court. Attachment merely prohibits dealing by the judgment-debtor and does not confer any title on the attaching creditor.⁵ It would therefore follow that when a fund in Court is attached by several decree-

1. *Ibid.* *Re Leavesley*, (1891) 2 Ch. 1 C.A. ; R.S.C., O. 46.

2. *Re Bell*, (1886) 34 W.R. 363 ; *Cole v. Eley*, (1894) 2 Q.B. 350 C.A.

3. *Edwards on EXECUTION*, 345.

4. C.P.C., O. 21, r. 52. See also Chapter on TERMINATION OF EXECUTION *post*.

5. *Raghunath v. Sundar*, (1914) 42 Cal. 72 P.C. ; *Frederick v. Madongopal*, (1902) 29 Cal. 428 P. C. See for more authorities Chapter on ATTACHMENT (*contd.*) *supra*.

holders they have equal rights in respect of it and must share in it rateably. This view has not however been uniformly accepted in Indian courts.

In *Thakurdas v. Joseph*,¹ the Calcutta High Court took this view and said that an order of Court under O. 21, r. 52 cannot confer any priority upon the person at whose instance the order was passed, since it amounts at most to an injunction restraining any dealing with the fund (see form 21, Ap. E of Sch. I of the Code) and merely renders (s. 64) any payment to the judgment-debtor, contrary to the attachment thereby effected, void against all claims enforceable under the attachment and in such a case the fund in Court must be distributed according to equity and good conscience on the principle followed by the Court in the administration of the assets of a deceased person or insolvent, that is, rateably amongst the creditors who have put in claims thereto. *Thakurdas v. Joseph.*

In Madras where the contrary view is taken, it formerly said that when a fund in Court is attached, it would not be 'assets held by' that Court within the meaning of S. 73, C. P. Code and that the attachments take effect in respect of it in order of time.² "The general principle is this, that a person who is diligent enough to invoke the aid of the Court in satisfaction of his decree should not be kept out of his rights because others have not been equally diligent in seeking their redress. The only restriction on his rights, is that if before he sets the

1. (1917) 44 Cal. 1072; *Katum Sahiba v. Hajee Badsha*, (1913) 38 Mad. 221 (225); *Sankaralinga v. Kandasami*, (1907) 30 Mad. 416; *Thirviyan v. Lakshmana*, (1917) 41 Mad. 616.

2. *Thiruvengadial v. Tiruvengadiah*, (1913) 26 M.L.J. 364= 24 I.C. 617.

process of the Court in motion to realise the assets others have applied for execution, he should share the realised assets with those other applicants.”¹

*Visvanathan
Chetty v.
Arunachalan
Chetty.*

In *Visvanathan Chetti v. Arunachalan Chetti*,² the question referred to the Full Bench was “Whether money deposited in Court to the credit of the judgment-debtor before any decree-holder applies in execution to have it paid in satisfaction of his decree should be dealt with on a system of priority when several decree-holders afterwards come in and apply to have it attached or whether it should be rateably distributed among them.” Wallis C.J., with whom the four other Judges agreed, said that the claim of creditors must be judged by the provisions of S. 73, C.P. Code and explained it thus; “The section which is now rule 52 prescribes a form of attachment for property which is “in the custody of a Court or any public officer” and “under the attachment is to be held subject to the further orders” of the attaching Court. Where the property attached is in the custody of a public officer, it is clearly the duty of the attaching Court to provide, if necessary, for the realization of the property and to divide the proceeds of the realization rateably between the attaching decree-holder and other decree-holders who have applied to it for execution before it received such proceeds in satisfaction of their decrees. If the attached property is money, it is now, in my opinion, the duty of the attaching Court, having regard to the provisions of section 295, to call on the public officer to pay it into Court and to deal with it in the same manner. When the property attached is in

1. *Umma Venkataratnam & Co. v. Adamji Usman & Co.*, (1919) 42 Mad. 692 (698).

2. (1921) 44 Mad. 100 F.B.

“the custody of a Court,” it is equally to be held by the custody Court subject to the further orders of the attaching Court, and subject also to the proviso which has next to be examined, which does not in my opinion either relieve the attaching Court of the duty of getting in and distributing the money or proceeds of realization if available and distributing them among the decree-holders entitled under section 295, now 73, or authorize the custody Court to embark on another sort of rateable distribution among another class of decree-holders. The proviso only says that “any question of title or priority arising between the decree-holder” (meaning the decree-holder who had made the attachment) “and any other person not being the judgment-debtor claiming to be interested in such property by virtue of any assignment, attachment, or otherwise shall be determined by such Court,” the custody Court. This will include claims questioning the title of the judgment-debtor and other cases, but taking the present case of the property in the custody Court being made the subject of several attachments in execution of several decrees, the custody Court is then in my opinion required by the proviso to determine which of these attachments is entitled to priority, and in the absence of any legislative provision (section 63, which has given rise to difficulties which need not now be considered, does not apply to the present case) to award such priority to the first attachment in date because that attachment became complete on the service of the notice on the custody Court and subsequent attachments cannot, in the absence of express legislative provision, affect the right of the first attaching creditor to have the attached property realized in execu-

tion of his decree and distributed rateably among the decree-holders entitled under section 295, now 73, in satisfaction of their decrees. If the other decree-holders want to share in the rateable distribution, their proper course is to apply in time, if they can, to the attaching or executing Court; and if, instead of doing so, they choose to attach the property in the custody Court, the result will be that the attaching decree-holder who is second in point of time will be entitled to proceed in execution against any balance that may be left in the hands of the custody Court after the full satisfaction of the decree of the first attaching decree-holder and of the other decree-holders who have entitled themselves to rateable distribution under section 295, now 73, in executing his decree. For these reasons, I am of opinion, with great respect, that *Katum Sahiba v. Hajee Badsha Sahib*,¹ and *Thakurdas Motilal v. Joseph Iskendar*,² allowing rateable distribution among decree-holders attaching the property in the custody Court, should not be followed.

“ The same principles must be applied in the present case, in which the attaching Court and the custody Court are the same. The fact that money was lying in Court to the credit of the judgment-debtor in a suit other than that in which the attachments were made does not make it assets “ held by a Court ” within the meaning of section 73, which clearly refers to assets levied in execution or paid into Court in satisfaction of the decree under execution, and not to assets lying in the same Court to the credit of the judgment-debtor in another suit.

1. (1915) 38 Mad. 221.

2. (1917) 44 Cal. 1072.

Such assets may of course be attached by the Court in execution of another decree of the same Court. The Code does not say how such attachment is to be made. The order "attach" appears to be sufficient, though of course some record of the attachment must be placed among the records of the suits to the credit of which the money is lying. On the other hand the order of attachment does not of itself effect a transfer to the credit of the suit in which the attachment is made so as to constitute a receipt of assets within the meaning of section 73. The money may not be available as being already subject to another attachment, possibly in another Court, and it is only when the Court comes to the conclusion that there is no objection and orders the money, or so much as it thinks necessary to satisfy the decree-holders who have applied to it for execution, to be transferred to the credit of the first attaching creditor's suit which it is engaged in executing, that there can be said to be receipt of assets within the meaning of section 73 and that a rateable distribution can be made. Judged by this test, the respondents in this appeal were entitled to rateable distribution, not on the grounds assigned in the lower Courts and referred to in the reference, but under section 73, Civil Procedure Code, because they applied for execution of their decrees to the Court executing the first attaching creditor's decree before the receipt of assets by that Court."

But in the case of partnership property, no attachment is allowed by the C. P. Code and an order charging the interest of the judgment-debtor is made in its stead. It is thus provided :

Charging
partner's
interest.

"(1) Save as otherwise provided by this rule, property belonging to a partnership shall not be at-

tached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all

orders made on such applications shall be similarly served."¹

These rules are copied from the English Partnership Act.² No execution can issue against any partnership property except on a decree passed against the firm or against the partner of a firm as such.³ The Court has power to make an order even in respect of a foreign firm having a branch place of business within its jurisdiction.⁴

In England the discretion given by this rule to direct accounts should be exercised only under special circumstances, as with a view to a dissolution.⁵ The same must be the rule in India. Even before the Partnership Act was passed in England, the assignee of a share in a partnership had no right to compel the other partners to come to an account with him during the continuance of the partnership.⁶

Apart from the difference of opinion on the nature of interest created by attaching a fund or property in the hands of the Court, as described above, it will be interesting to see the right of a creditor who obtained an order *charging the interest of a partner* in the partnership property and profits. The rule, though designated, as a provision for attachment of partnership property, in the margin,

1. C.P.C., O. 21, r. 49.

2. 53 and 54 Vic. c. 39, S. 23. See R.S.C., O. 46, rr. 1A, 1B.

3. See *Karimbhai v. Conservator of Forests*, (1879) 4 Bom. 222.

4. See *Brown Janson Co. v. Hutchinson & Co.*, (1895) 2 Q.B. 126 C.A.

5. *Brown Janson & Co. v. Hutchinson & Co.*, (1895) 2 Q.B. 126.

6. *Ibid.* See Lindley on PARTNERSHIP, 5th Ed. 364; but see contra *Whetham v. Davey*, (1888) 30 Ch.D. 574; *Glyn v. Hood*, (1859) 1 Giff. 328.

clearly prohibits attachment and sale in execution of the decree and makes provision for charging orders, on the analogy of charging orders in England. When there are more creditors than one obtaining such an order, the principles of the English law will naturally apply and the creditors would rank in priority according to the dates of their respective orders.

CHAPTER XX

Sales in Execution

Sale—Voluntary and involuntary sales—Applicability of the T. P. Act—Ostensible ownership—Interest subsequently acquired—Apportionment of rents—Warranty of title—Insurance—Improvements—Liabilities and equities—Applicability of the Registration Act—Judicial and Execution Sales—Distinction not maintained in India—Courts that can order sale—Proclamation of sales—Contents of proclamation—Powers in settling proclamation—Manner of proclamation—Application for sale—Time of sale—Place of sale—Particulars of property—Powers in settling proclamation—Appeal—Notice of sale—Conduct of sale—Duty of officer conducting sale—Auction—Bids and bidders—Officers of Court—Pleader—Decree-holder and leave to bid—Effect of leave to bid—Set-off when allowed—Absence of leave—Plea may be raised in defence to action—Interval after proclamation—Adjournment of sale—Fresh proclamation—Stopping sale on payment—Sale of agricultural produce—Sale of negotiable instruments—Payment of price in the case of moveables—Irregularity in sale of moveables—Deposit of 25%—Failure of deposit—Resale—Payment of full price—Forfeiture of deposit—Recovery of deficiency on resale—Certificate of deficiency—Resale must be of the same property—Appeal and other remedies—Confirmation of sales—Appeal—Bar of suit against orders under rule 92—Effect of confirmation—Certificate of sale—Amendment of certificate—Stamp—Registration—Date of certificate.

Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised,¹ or a transfer of the absolute or general property in a thing for a price in money.² Such transfer may be voluntary or involuntary. A voluntary sale is the result of a contract between the vendor and purchaser and the choice of the price and the person for the sale is with the vendor. An involuntary sale (*sale in invitum*) is a compul-

Sale.
Voluntary and involuntary sales.

1. T. P. Act (IV of 1882), s. 54; Indian Contract Act (IX of 1872), ss. 77-78. The T. P. Act is not in force in the Punjab.

2. Benjamin on SALES, 1.

sory sale in which the vendor's choice or will need play no part and which is ordered and directed by a Court and becomes conclusive on the Court's confirmation ; such a sale cannot be set aside except on the ground of want of jurisdiction to order the sale or on the ground of fraud or material irregularity etc., as provided by the Code of Civil Procedure.¹

Applicability
of T. P. Act.

A voluntary sale must be effected in the manner prescribed by the Transfer of Property Act, 1882 and the Indian Registration Act, 1908. Under section 2 of the former Act, nothing contained therein shall be deemed to affect, "save as provided by section 57, and Chapter four of this Act, any transfer by operation of law or by or in execution of, a decree or order of a Court of competent jurisdiction."² The result of this exclusion is that the several incidents attached by the Transfer of Property Act to voluntary sales are inapplicable to involuntary sales.³

Ostensible
ownership.

Under section 41 of the Transfer of Property Act, 1882, "where, with the consent, express or implied, of the person interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it :

1. See Chapter on ANNULMENT OF SALES *post*.

2. *Balaji v. Dajiba*, (1888) 2 C.P.L.R. 137.

3. As to the applicability of s. 40, see *Rebala Venkatarreddi v. Mangadu Yellappa Chetty*, (1917) 5 L.W. 234=38 I.C. 107 ; of s. 52, see Chapter on AUCTION-PURCHASER *post* ; of s. 56, see *Rama Shankar Prasad v. Ghulam Hussain*, (1921) 63 I.C. 209 ; of ss. 8, 86, 44 and 52, see *Penumetsa Subbaraju v. Veegasena Seetharamaraju*, (1914) 39 Mad. 283.

provided that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer had acted in good faith."

The rule was recognised in India long before this enactment,¹ and is in force even in the Punjab.² The principle of this section applies to a purchaser at court-sales.³

Under Section 43 of the Transfer of Property Act, 1882, "where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists." Interest subsequently acquired.

This rule has no application to sales in execution.⁴ Mookerjee, J. said, "In the case of a voluntary private alienation, the deed, either expressly or by necessary implication, shows that the grantor intended to convey and that the grantee expected to become vested with an estate of a particular kind; the deed may consequently found an estoppel, although it contains no technical covenants. The case of an execution sale stands on an obviously different footing. The decree-holder does not guarantee the title of the judgment-debtor; the intend-

1. *Mohesh Chandra v. Issur Chunder*, 1 Ind. Jur. 266; *Ram Coonar v. McQueen*, (1873) 11 B.L.R. 46 P.C.; *Uda Begum v. Imamuddin*, (1879) 1 All. 82.

2. *Mt. Basso v. Mir Mahomed*, (1913) P.L.R. 378.

3. *Radha Mudhob v. Kalpataru Roy*, (1912) 17 C.L.J. 209 = 16 I.C. 811; *Naraprath Kummali v. Paramboli Kandi*, (1916) 34 I.C. 494.

4. *Aluknonce Dabee v. Banee Madhub*, (1878) 4 Cal. 677.

ing purchaser knows that under the law he can acquire nothing beyond the right, title and interest of the judgment-debtor.... An execution sale of property not belonging to the judgment-debtor does not estop him from asserting against the purchaser title subsequently acquired."¹

Apportion-
ment of rents.

Under Section 36 of the Transfer of Property Act, 1882, "In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income, shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, to be apportionable accordingly, but to be payable on the days appointed for the payment thereof."

According to the Calcutta High Court, this is the only statutory provision in India dealing with apportionment and this provision does not apply to involuntary sales.² But a contrary view was taken in Madras. Subrahmanya Iyer J. said "In the absence of a specific rule applicable in India, the Courts are entitled to follow the just and broad principle underlying the English law culminating in the Apportionment Act of 1870 and hold that, as a matter of equity and good conscience, the assignee of a tenant-for-life was entitled to the apportionment of rent, which accrued due up to the date of the death of the life-tenant."³

1. *Prosonna Kumar v. Srikant Rant*, (1912) 40 Cal. 173.

2. *Mathewson v. Shyam Sunder Sinha*, (1906) 33 Cal. 786; *Satyendranath v. Nilkantha*, (1893) 21 Cal. 383.

3. *Lakshminarayanappa v. Meloth Raman Nair*, (1902) 26 Mad. 540; *Kunhi Sou v. Mulloli Chathu*, (1915) 38 Mad. 86;

Under Section 55 of the Transfer of Property Act, 1882, several obligations are laid on the buyer and the seller. For instance, "the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same." In sales in execution there is no warranty of title and no assurance that the property will answer to the description given of it and when the judgment-debtor has a saleable interest, however small, the purchaser in execution buys at his risk.¹

Warranty of title.

"The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a Sheriff's sale has at best very inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title and interest of the judgment-debtor with all its defects; and the Sheriff who sells and executes a bill of sale is never called

Rangiah Chetty v. Vajravelu, (1917) 40 Mad. 370. See also *Pem-metsa Subbaraju v. Veegasena Seetharamaraju*, (1914) 39 Mad. 283.

1. *Sundara Gopalan v. Venkatavarada Ayyangar*, (1893) 17 Mad. 228; *Sonaram Dass v. Mohiram Dass*, (1900) 28 Cal. 235; *Shanto Chandar v. Nain Sukh*, (1901) 23 All. 355; *Muhammad Rahmatullah v. Bachcho*, (1905) 27 All. 537; *Peer Mahomed v. Mahomed Ebrahim*, (1904) 29 Bom. 234; *Moitheensa Rowthan v. Apsa Bivi*, (1911) 36 Mad. 194; *Mashim Isphany v. N.A.P.K. Chetty Firm*, (1916) 8 L.B.R. 427 = 33 I.C. 1003. For a fuller discussion, see Chapter on AUCTION-PURCHASER post.

upon, and, if called upon, would refuse to execute any covenant of title."¹

Insurance.

Under Section 135, of the Transfer of Property Act, 1882 "Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy has been made with himself."

This provision has no application to sales in execution.²

There are however some circumstances where the provisions of the Transfer of Property Act, 1882 though declared inapplicable to sales in execution, have been applied to purchasers at court-sales as enunciating general principles of equity which were in force before that Act was passed and which were not abrogated by such enactment.

Improvements.

Under Section 51 of the Transfer of Property Act, 1882, "When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee or to sell his interest in the property to the transferee at the then market value thereof irrespective of the

1. *Dorab Ali Khan v. Executors of K. Moheooodeen*, (1878) 3 Cal. 806 P.C.

2. *Krishnan v. Perachan*, (1892) 15 Mad. 382; *Palaniappa Tevan v. Shadagopa Mudaliar*, (1911) 1 M.W.N. 133=9 I.C. 729.

value of such improvement. The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. When under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them."

These provisions are not applicable to purchasers at court-sales, though as a matter of equitable rule, Courts have awarded to them the value of improvements *bona fide* effected by them, when they have been evicted from the property subsequently on account of some defect or irregularity in the proceedings leading to the sale.¹

Under Section 132 of the Transfer of Property Act, 1882, "The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer."

Liabilities
and equities.

This section merely enacted a rule of law which was in force before that Act was passed and though it may not apply of itself to the transferee of an actionable claim, who gets his title by purchase in court-auction, section 2 (d) of the said Act cannot relieve such transferee from the liabilities and equities to which he has been all along subject under the common law before that Act was passed.²

Under Section 17 of the Indian Registration Act, 1908, "any certificate of sale granted to the purchaser of any property sold by public auction by a

Applicability
of the Regis-
tration Act.

1. *Moitheensa v. Apsa Bivi*, (1911) 36 Mad. 194. For a fuller discussion see Chapter on AUCTION-PURCHASER post.

2. *Subramanian Pattar v. Kiradadasan*, (1912) M.W.N. 1235 = 16 I.C. 686.

Civil or Revenue officer " is excepted from the rule of compulsory registration. But it is provided by section 89 that " Every Court granting a certificate of sale of immoveable property under the Code of Civil Procedure, 1908, shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immoveable property comprised in such certificate is situate and such officer shall file the copy in Book No. 1."

Judicial and
execution
sales.

A distinction is made in England and America, between a judicial and an execution sale. " A judicial sale is one made in contemplation of law, by the Court *pendente lite*. It is a sale of property made under the decree of a Court of competent jurisdiction, having authority to order it, and is made through the instrumentality of some officer of the Court whether elected or appointed or commissioned to make the sale.....Accordingly, in theory of law, in a strict judicial sale, the Court itself is properly the vendor, and the sale, in so far as the owner of the property is concerned, is an involuntary one."¹ Among instances of such sales are sales by assignees in bankruptcy, by a guardian of ward of Court, by an administrator under the order of a Court of Probate, in proceedings for partition and sale, of mortgage liens, and in proceedings in admiralty.

" Execution sales under writs of execution issued upon a judgment for money in a suit at law are generally not judicial, but merely ministerial.In theory of law an execution sale is but the transfer of the title to the property involved which the judgment-debtor himself might voluntarily

1. Kleber on VOID JUDICIAL SALES, 58-9.

transfer. In making the execution sale the purchaser takes title to the property not mediately but immediately from the defendant in the writ, and the sheriff is the agent of the debtor in making the sale, constituted and appointed for that purpose by law."¹

In India, this distinction between judicial and execution sales is not technically maintained, but sales in suits for partition, for dissolution of partnerships, and for administration or in cases of insolvency or proceedings under the Guardian and Wards Act may be called 'judicial.' Sales in decrees on mortgages must in India be called only sales in execution, because the procedure for the conduct, completion and annulment of such sales, is the same as in the case of a decree for money, save that in the latter case, the sale follows attachment.

Distinction
not main-
tained in
India.

In this treatise we are concerned only with sales in execution of decrees and orders of civil Courts. The law of execution in England is essentially different from that in India. "In England the execution of a decree for money is entrusted to the sheriff, an officer who is bound to use his own discretion; and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex parte* application of the creditor who is bound to specify the property which he desires to attach and its estimated value and the act of attachment is that of the creditor for which he is in law responsible."²

1. *Ibid.* 63-4.

2. See *Kissori Mohan, Roy v. Harsukh Das*, (1889) 17 Cal. 436 P.C.

In India, sales in execution are ordered, directed conducted and confirmed by the Court which executes the decree, in the manner provided by the Code of Civil Procedure. "A sale in execution is not a sale by the owner of the property, but by a Court which has statutory power conferred upon it of transferring the interest of the judgment-debtor to the purchaser and to that end a certain course of procedure is prescribed terminating with the sale-certificate, which confers on the person named therein his title. The statutory title so created is all that the Court of execution is concerned with when, after confirmation, the sale is impugned by the judgment-debtor."¹

Courts that
can order
sale.

"Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."² Where the property is under attachment by two Courts of different grades, the Court of the lower grade can order a sale in execution of its decree and the sale is not a nullity.³

"Any Court" means any Court having jurisdiction to order the sale.⁴ "Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes."⁵ A

1. *Baroda Kanta Bose v. Chunder Kanta Ghose*, (1902) 29 Cal. 682.

2. C.P.C., O. 21 r. 64 (=Old Code, S. 284)

3. *Gopichand v. Karemunnessa* (1907) 34 Cal. 836. See also *Himmat v. Bhagwat*, (1899) 13 C.P.L.R. 145; *Ram Narain v. Mina*, (1897) 25 Cal. 46; *Patel v. Haridas*, (1893) 18 Bom. 458; and Chapter on ATTACHMENT *infra*.

4. *Syud Nawab Ali v. Sheik Uzir*, (1875) 23 W. R. 233.

5. C.P.C., O. 21 r. 82 (=Old Code, S. 304).

purchaser of immoveable property at a sale held by a Court of Small Causes acquires no title.¹ Rights and interests under a mortgage of immoveable property² and under a decree charging immoveable property³ are immoveable property.

Save in the case of decrees on mortgages, the Court has no jurisdiction to sell property which has not been attached in execution.⁴ But if property has been attached, it is not necessary, in the case of moveables, that they must be before the Court, when making the order for their sale.⁵

Though the decree-holder may take out money before confirmation of sale, as is implied in Order 21 rule 93 C. P. Code, the Court holding the sale has a discretion to refuse to pay it before the confirmation of the sale.⁶ The decree-holder is entitled to interest up to that time.⁷ But the twenty-five per cent of the price deposited at the time of the sale is not immediately available for payment to the decree-holder because it is only a deposit and because if the balance of the purchase-money is not paid the sale falls to the ground and the deposit may be forfeited to the Government.⁸

1. *Natto Meah v. Nund Ranee*, (1872) 17 W.R. 308 (Huts are immoveable property).

2. *Buddoo Mull v. Maharoop*, (1874) 6 N.W.P. 129.

3. *Bhawani Kuar v. Gulab Rai*, (1877) 1 All. 348; *Sami v. Krishnasami*, (1888) 10 Mad. 169.

4. *Sasirama Kumari v. Meherban Khan*, (1911) 13 C.L.J. 248=9 I.C. 918; *Panchaman Das v. Konja Behari*, (1917) 42 I.C. 259. For a discussion, see Chapter on VOID and VOIDABLE SALES *post*.

5. *Kamisetti Pedda Venkata Subbayya v. Tangatur Subbayya*, (1915) M.W.N. 159=28 I.C. 62.

6. *Jogendro v. Gobind*, (1886) 12 Cal. 252.

7. *Upendranath v. Bhudeb Chandra Roy*, (1914) 25 I.C. 859.

8. *Hafiz v. Damodar*, (1891) 18 Cal. 242.

Proclamation
of sales.

“ 1. Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Contents of
proclamation.

2 Such proclamation shall be drawn up *after notice to the decree-holder and the judgment-debtor* and shall state the time and place of sale, and specify as fairly and accurately as possible

- (a) the property to be sold ;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government ;
- (c) any incumbrance to which the property is liable ;
- (d) the amount for the recovery of which the sale is ordered ; and
- e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.”

3. Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

Powers in
settling pro-
clamation.

4. For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any

such matters and require him to produce any document in his possession or power relating thereto."¹

"1. Every proclamation shall be made and published, as nearly as may be in the manner prescribed by rule 54, sub-rule (2). Manner of proclamation.

2. Where the Court so directs,² such proclamation shall also be published in the local official Gazette or in a local newspaper,³ or in both, and the costs of such publication shall be deemed to be costs of the sale.

3. Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given."⁴

1. C.P.C., O. 21, r. 66 (=Old Code S. 287).

2. This is only discretionary, *Gopi Chand v. Benarsi Das*, (1919) 1 Lah. L. J. 197.

3. "The generally accepted definition of a newspaper, however, is, that it is 'a publication, unusually in sheet form, intended for general circulation, and published at short intervals, containing intelligence of current events and news of general interest,' and that 'if a publication contains the general and current news of the day, it is none the less a newspaper because it is chiefly devoted to the dissemination of intelligence of a particular kind or to the advocacy of particular principles or views. Most newspapers are devoted largely to special interests, political, religious, financial, moral, social, and the like, and each is naturally patronized mainly by those who are in accord with the views which it advocates, or who are most interested in the kind of intelligence to which it gives special prominence, but if it gives the general, current news of the day, it still comes within the definition of a newspaper.'"—Freeman on EXECUTIONS, II. 1652.

4. C.P.C., O. 21, r. 67 (=Old Code, S. 289). Sub-rule (3) incorporates the decision in *De Penha v. Jalbhoy*, (1888) 12 Bom. 368.

The following rules have been framed in Lower Burma :

104. When the certificate prescribed by section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room,

Particulars in
settling
proclamation.

The object of the proclamation is to invite bidders and give them such information regarding the property to be sold, as may be necessary for a

105. Every attachment of moveable property under rule 43, of Negotiable Instruments under rule 51, and of immoveable property under rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed ; in which case those reasons shall be stated in the hand-writing of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application a certificate from the sub-registrar within whose sub-district such property is situated, showing that the sub-registrar has searched his book Nos. I and II and their indices for the past twelve years and stating the encumbrances, if any, which he has found on the property.

107. Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 188711-238-10, dated 7th October 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary ; and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own hand-writing.

108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The certificate of the sub-registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by the Collector.

purchaser to know.¹ The Court is bound to do what it can to secure the accuracy of the information contained in the proclamation of sale and ought not to trust for such information to persons whose knowledge is obviously not at first hand.² The Court must therefore see that all particulars men-

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the inquiry.

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112. The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall wholly or in part be omitted therefrom.

113. When permission has been given to a decree-holder to bid for property, the Court ordering the sale shall inform the officer appointed to conduct the sale whether there are any persons, in addition to the decree-holder, entitled to share in the sale proceeds.

114. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military Cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

130. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

1. *Lack Ram v. Mohesh*, (1869) 12 W.R. 488; *Dwarka Nath v. Aloke Chunder*, (1883) 9 Cal. 641.

2. *Din Dayal v. Naziruddin*, (1901) A.W.N. 167. See also *Bhagwan Das v. Ahmad Jan*, (1916) 3 O.L.J. 422=36 I.C. 732.

tioned in this rule are given fairly and accurately, for an omission may be a ground for setting aside the sale, if substantial injury is caused by it.¹

Application
for sale.

An omission to sign the application under this rule can be cured by amendment. The application can be verified by an agent of the decree-holder acquainted with the facts of the case.²

Time of sale.

The proclamation must fix a day for the sale which is not a holiday on which the Courts are closed by the order of the High Court.³

“ The time of the sale should, of course, be stated in the notice with sufficient accuracy to enable intending bidders to know when to be present. A mistake in naming the day may be so obvious as to permit no reasonable doubt of the time intended. If so, the purpose of the notice is accomplished, and the advertisement is sufficient in this respect. Hence, if in 1896, a notice is published, which purports to fix a date of sale as in 1996, it will not be presumed that any one could have been misled, or have understood otherwise than that the sale was to be in the former year rather than a century later. So, where the law requires all sales to take place between nine o'clock in the forenoon and the setting of the sun, an advertisement of a sale at one o'clock in the forenoon will not mislead any one, for all persons must understand that the sale is not, in violation of law, to take place in the middle of the night, and that, on the other hand, the hour intended is in the afternoon. As each day consists of

1. See C.P.C., O. 21, r. 90.

2. *Raja Brajasundar v. Sivararanjan*, (1921) 1 Pat. L.T. 647 = 59 I.C. 282; *Motabar Hussain v. Muhammad*, (1924) 40 C.L.J. 311 = 84 I.C. 700.

3. *Haro v. Jadub*, (1865) 3 W.R. Mis. 24.

twenty-four hours, the majority of which could not be regarded as appropriate for business of this character, a notice is insufficient which merely names the day proposed for the sale. The notice may undertake to name the day of the week as well as of the month, and the two days named may not correspond, as where Friday, the 17th, is designated, when Friday, in fact falls on the 16th. In that event, doubt would undoubtedly exist in the minds of all readers of the notice, as to whether the sale would be held on the 17th or on the Friday preceding that day. Hence, the notice has been treated as ineffectual, because intending bidders "would be deterred by such a blunder." The hour at which the sale is to take place should be stated or, when that is not done, certain business hours must be mentioned between which the sale will be made. It would seem that the notice ought to name the very hour at which the sale will commence, so that persons having any inclination to attend will not be deterred from doing so by the fact that they might be kept waiting during all the business hours of the day. The authorities, however, sustain notices which declare that the sale will be made between certain designated hours, provided that both hours are in the business part of the day."¹

"The omission of the place of sale therefrom entirely destroys the value of the notice; and a sale made pursuant to such defective notice has no greater validity than a sale made without the publication of any notice whatever. The naming in the notice of an impossible or non-existent place is equivalent to not attempting to name any place. The question of most difficulty in connection with

Place of sale.

1. Freeman on EXECUTIONS, Vol. II, 1644.

this subject is what degree of precision must be employed in designating a place of sale. We apprehend that the answer must be, that the precise spot need not be pointed out; that the notice will be sufficient if it designates the place with such certainty that any person exhibiting any interest in the matter would have no difficulty in participating in the sale."¹

Particulars of property.

Particulars of the property to be sold must be set out,² but if a portion of it is released from attachment after the date of the proclamation, a fresh proclamation is necessary,³ unless the portion released is advertised to be sold as a separate lot and is distinctly separable. But no plan of a house is necessary.⁴

Encumbrances.

It is the duty of the decree-holder to notify all incumbrances on the property, and particularly so, if he himself holds the incumbrances; in the latter case, an omission to mention them may create an estoppel.⁵ A decree-holder or an attaching creditor seeking to bring properties to sale in execution is not required to do more than comply with the provision of rule 66 (3) and file an affidavit in the form prescribed by Civil Rules of Practice. He is not required to inspect and peruse all mortgage-documents mentioned in the encumbrance certificate. A proclamation of sale set out the mortgages on the property but it did not set out that under the terms

1. Freeman on EXECUTIONS, II. 1646.

2. *Raja Ramassur v. Rai Sham*, (1901) 8 C.W.N. 257.

3. *Shib Prckash v. Sardar Doyal*, (1878) 3 Cal. 544.

4. *Narindar v. Sukhkan*, (1924) 80 I.C. 667.

5. *Kalidas v. Prasanna Kumar*, (1920) 47 Cal. 446; *Maung Kyin Pein v. Mi Pwa Me*, (1921) 64 I.C. 953. See *Sant Bux v. Nadir Mirza*, (1924) 81 I. C. 1013. For a fuller discussion, see Chapter on ESTOPPEL IN EXECUTION *post*.

of the mortgage the mortgagor was not entitled to recover the property without at the same time redeeming the mortgages on other properties. The purchaser at the execution sale sought to have the sale set aside as the proclamation of sale did not disclose such a contract against redemption. It was held that the sale could not be set aside.¹

When a Court receives an application for execution against property which is admittedly or is alleged to be subject to mortgage, it should give notice to the mortgagee, and ask him whether he consents to the sale of the property free of mortgage. If he consents and there is no dispute as to the fact of the mortgage or the amount of the mortgage money, the Court may under the provisions of section 73 (b) of the Code of Civil Procedure direct the sale of the property free of mortgage, giving the mortgagee the same interest in the proceeds of the sale as he had in the property sold. In that case no mention of the mortgage should be made in the proclamation of sale. If the mortgagee does not consent to the sale of the property free of his mortgage, but the amount of the mortgage money is not disputed, the proclamation must state that what is sold is the right to redeem the land for that amount. If either the fact of the mortgage or the amount of the mortgage money be disputed the proper procedure is for the Court to make a summary enquiry under the provisions of Order 21, rule 66 (4), with a view to ascertaining what the exact nature of the mortgagee's claim is and how far it is admitted by the decree-holder, and then to state the result of the enquiry in the proclamation

1. *Ponnusamy v. Abdul Hafiz*, (1921) 13 L.W. 444=62 I.C. 735.

of sale, which should show clearly that what is to be sold is only the judgment-debtor's interest in the property, and that a mortgage for so much is claimed against the property but is disputed or not admitted, or that the mortgage is admitted but the amount of the mortgage money is disputed or is admitted only in part.¹

A claim preferred or an objection made under Order 21, rule 58, Civil Procedure Code, must result in an order passed either under rule 60 or under rule 61 and it is to an order made under the one or the other of those rules that the provision of rule 63 applies. Under rule 62, the Court may neither release the property nor disallow the claim and may continue the attachment subject to the charge; and it is only the result of the action of the Court, taken under rule 62, that will be notified to the public at large by an entry in the sale proclamation under rule 66 (2), clause (c), and it is this entry that the intending purchaser will look to, whether the entry is founded on an action of the Court taken under rule 62, on the basis of the materials supplied by the parties or on the basis of a report from the Registration Office; in both cases the entry in the sale proclamation would be the same, and there is no distinction in the effect of the entry in the two cases, and in so far as the auction-purchaser's rights and liabilities are concerned, he will be bound by the entry in the sale proclamation as to the incumbrances on the property to be sold. In both cases he has nothing before him except the entry in the sale proclamation and is only affected by the notice conveyed thereby. Whether an inquiry into the

1. *Ovanna Perumal Chetty v. Maung Myin*, (1919) 51 I.C. 751.

validity of the incumbrance has taken place or not previous to the entry in the proclamation is no concern of his, for the simple reason that he does not come on the scene previous to the commencement of the sale. It is not necessary that the exercise of the discretion vested in the Court in charge of the execution proceedings under the provision of rule 62 must always be based on an investigation into the nature and the validity of the charge or the mortgage. It may be that the Court only decides under that rule to give notice under rule 66 to the intending purchaser that a claim is made in support of the charge or the mortgage; but then the purchaser merely takes the risk of the notice. Whether the property is sold subject to a mortgage or a charge or whether merely a notice of such encumbrance is given in the sale proclamation the result is the same. In either case it is nothing but a notice as to the judgment-debtor's indemnity against the encumbrances.¹

The value of the property must be stated and if necessary, the Court should hold an inquiry and insert the value in the proclamation.² The Court has no jurisdiction to fix the valuation before the day fixed for settling the proclamation.³ To order property which is to be put up for sale in execution of a decree to be valued at twenty times the Government revenue is merely a colorable pretence of making the valuation required by law and

Value of
property.

1. *Sant Bux v. Nadir Mirza*, (1924) 81 I.C. 1013.

2. *Lachman v. Ganga*, (1912) 15 C.W.N. 713 = 6 I. C. 180; *Rajbans Sahay v. Askaran Baid*, (1922) 1 Pat. 214; *Surendra v. Hurruck*, (1908) 12 C.W.N. 542 holding contrary opinion in *Kashi v. Jamuna*, (1904) 31 Cal. 922 to be obiter.

3. *Sukhranj v. Debi Buksh*, (1923) 3 Pat. L.T. 342 = 65 I.C. 360.

such an order cannot be sustained.¹ The valuation made by the decree-holder or the judgment-debtor should not be inserted in the proclamation and the insertion of any valuation, other than that fixed by Court, is calculated to mislead intending bidders and is therefore wrong,² but the Court may insert the values given by the parties in exceptional cases.³

A statement of the revenue assessed on the property is a material matter that must be stated in the proclamation.⁴

Order settling
proclamation.

It is competent to issue a proclamation before objections advanced by the judgment-debtor have been judicially disposed of, though it may be that the property cannot be sold until the objections are disposed of.⁵

An objection raised in the course of the inquiry cannot be treated as a claim under rule 58, which refers to a claim on attachment.⁶ An order passed in an enquiry under rule 66 is not conclusive as between the decree-holder or purchaser on the one hand and the holder of the incumbrance on the other.⁷

1. *Jagannath v. Chitragupta*, (1918) 3 Pat. L.J. 580=48 I.C. 141.

2. *Rai Beni v. Edal*, (1919) 4 Pat. L. J. 37=49 I.C. 195; *Damrupat Singh v. Rameshwar Singh*, (1923) Pat. 208=73 I.C. 317. See also *Raghunath Singh v. Hazari Sahu*, (1917) 2 Pat. L.J. 130=37 I.C. 872 F.B.

3. See *Nand Kishwar v. Kedarnath*, (1917) 40 I.C. 849; *Bijoy Singh v. Ashutooh Gossami*, (1925) 28 C. W. N. 552=83 I.C. 430; *Jashimuddin v. Mammohini*, (1922) Cal. 63.

4. *Bali Ram v. Seth Narsinghdas*, (1923) 45 M.L.J. 403=75 I.C. 546.

5. *Harendra v. Haricharan*, (1918) 43 I.C. 450.

6. *Bhiku Lal v. Khemchand*, (1890) 14 Bom. 369; *Parshottam v. Ganesh*, (1899) 23 Bom. 759. But see contra *Raghunath Singh v. Hazari Sahu*, (1917) 2 Pat L.J. 130=37 I.C. 872 F.B.

7. *Bhagwan Das v. Ahmun Jan*, (1916) 3 O.L.J. 422=36 I.C. 732.

An order settling the terms of the proclamation, such as, fixing the valuation of the property under this rule, is not an order relating to the execution of a decree within the meaning of Section 47 and is not therefore appealable.¹ For instance an order which purported to be under rule 66 and which directed the order in which the shares of the judgment-debtors were to be sold was a judicial order not warranted by the section and so ultra vires.²

A contrary view has been taken in Lahore and Patna : The action of the Court in settling the terms of a proclamation under rule 66 is a judicial proceeding; it differs from section 287 of the old Code, in that it requires the Court to draw up the proclamation after notice to the decree-holder and judgment-debtor and this indicates the action of the

1. *Sivagami v. Subramanya*, (1903) 27 Mad. 259 F.B.; *Ramanatha v. Somasundara*, (1917) M.W.N. 141=37 I.C. 897; *Ramanathan v. Venkatachellam*, (1923) 44 M.L.J. 599=72 I.C. 836; *Deokinandan v. Bansi*, (1912) 16 C.W.N. 124=10 I.C. 371; *Mahammed v. Tara*, (1914) 22 I.C. 548; *Panch v. Mani*, (1912) 16 C.W.N. 970=17 I.C. 88; *N. C. Chatterji v. R. M. K. Karpan Chetty*, (1916) 8 L.B.R. 350=36 I.C. 402; *Sakhi v. Kalanand*, (1911) 14 C.L.J. 607=11 I.C. 759; *Bejoy v. Dharendra*, (1918) 47 I.C. 512; *Ajudhia v. Gopinath*, (1917) 39 All. 415; *Deokinandan v. Rajah Dakeswar*, (1917) 2 Pat. L.J. 13=38 I.C. 616 (distinguishing *Ganga Prosad v. Raj Coomar*, (1903) 30 Cal. 617 and *Raja Rameswar v. Rai Sham*, (1901) 8 C.W.N. 257, as passed under the old definition of decree); *Surendranath v. Mritunjay*, (1920) 5 Pat. L.J. 270=56 I.C. 452; *Giridhari Lal v. Altif Ali*, (1918) 46 I.C. 564. See *Lakshpati v. Harkho*, (1909) 6 M.L.T. 252=3 I.C. 342; *Pran Singh v. Janardan Singh*, (1911) 14 C.L.J. 541=13 I.C. 337; *Raja Braja Sundar v. Sivarankan*, (1920) 1 Pat. L.T. 647=59 I.C. 282. But see contra *Sham Lal v. Roshan Lal*, (1916) 14 A.L.J. 363=35 I.C. 230; *Jogeshchandra v. Hemendra Kumar*, (1922) 35 C.L.J. 170=64 I.C. 547.

2. *Krishnaswami v. Swaminadha*, (1907) 4 M.L.T. 352. See also *Vedavyasa v. Madura Hindu Sabha Nidhi*, (1923) 45 M.L.J. 473=77 I.C. 148.

Court is intended to be judicial.¹ A revision may lie under S. 107, of the Government of India Act, 1915, if not S. 115 of under the C. P. Code.²

Notice of sale.

The provision for notice under Or. 21 rule 66 is directory and not mandatory, enacted not for the benefit of the judgment-debtor but with a view to ascertain the exact rights which should be set forth in the proclamation of sale.³ Failure to serve the proclamation does not vitiate the sale when the judgment-debtor knows of it.⁴

Where the judgment-debtor had notice issued to him of the date for settling the sale proclamation and in spite of it did not attend or assist the Court in fixing the valuation he is afterwards estopped from objecting to the valuation.⁵

Where on an application for execution notice had been issued under Order 21, rule 66 of the C.P. Code and the particulars to be entered in the proclamation of sale were settled, the omission to issue the notice under that rule again on a succeeding application for execution does not constitute an irregularity.⁶ When a proclamation of sale of lands in execution of a decree as framed by the Court was not published in the village where the lands were

1. *Raghunath Singh v. Hazari*, (1917) 2 Pat. L.J. 130=37 I.C. 872 F.B.; *Kanhia v. Bank of Upper India Ltd.*, (1919) P.W.R. 36=49 I.C. 539.

2. *Ibid.*

3. *Fazal Ahmad v. Wesaluddin*, (1916) 38 All. 481; *Krishnaji v. Baliram*, (1918) 44 I.C. 252. See contra *Ramasami v. Ma U Tha*, (1917) 11 Bur. L.T. 40=38 I.C. 98.

4. *Jashimuddin v. Manmohini*, (1922) Cal. 93.

5. *Mahadeo Singh v. Dhobi Singh*, (1923) 2 Pat. 916=74 I.C. 838; *Pran Singh v. Janardhan Singh*, (1912) 14 C.L.J. 541=13 I.C. 337.

6. *Basant Lal v. Saiyad Husain*, (1922) 24 O.C. 391=65 I.C. 988.

situate but the process-server intimated at the village that the sale would be held at a place and by an officer different from those fixed by the proclamation, a sale held at the place and by the official fixed by the proclamation is illegal and a nullity and not merely "irregular" within the meaning of O. 21, r. 90 C.P. Code.¹

A complaint relating to the violation of Order 21 rule 66 on the ground that notice was not given to all the parties concerned before settling the proclamation is not covered by Order 21 rule 90 and can be considered only under Section 47. There is therefore an appeal and a second appeal against a decision in the matter.²

"Save as otherwise prescribed,³ every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in the manner prescribed."⁴ The words "as the Court may appoint" refer not only to "such other person," but also to an officer of the Court,⁵ so that in the absence of the Subordinate Judge, the Judge cannot sell.⁶ The employment of agents for the conduct of a sale in execution of a decree is contemplated by this rule and the fact that the Court appoints a nominee of the parties to a consent decree to conduct the sale and dispenses

Conduct of
sale.

1. *Jayaram Ayyar v. Vridhagiri Aiyar*, (1921) 44 Mad. 35.

2. *Thekkedath Neelu v. Subramania*, (1919) M.W.N. 897=53 I.C. 809.

3. See C.P.C., O. 21, r. 76 for sale of negotiable instruments and shares and stocks.

4. C.P.C., O. 21, r. 65 (=Old Code S. 286).

5. *Judoonath Roy v. Ram Baksh*, (1867) 12 W.R. 238; *Omar Chunder v. Soormunnissa Khatoon*, (1864) W.R. 44.

6. *Ibid.*

with the usual preliminaries, such as attachment and issue of notice, does not render it any the less a sale by Court.¹

Duty of
officer con-
ducting sale.

“The officer charged with the execution of the writ, while he must not unnecessarily imperil the rights of the plaintiff, ought always to seek to avoid the sacrifice of the property of the defendant. To prevent such a sacrifice, the officer is invested with a very large discretion. In the exercise of this discretion, he may and ought, even against the protest of the plaintiff, to adjourn the sale, or return that the property is unsold for want of bidders whenever he sees that his proceeding with the sale is likely to operate as a sacrifice of the property in excess of that usually attendant on forced sales of like property. He is not, however, under any duty, at the suggestion of a third person who does not appear to be a party to the litigation, to continue a sale on the ground that it is to take place on Saturday, and such person is of a religious faith which does not permit his doing business on that day.”²

Auction.

An auction in the widest sense of the term is any mode of sale, however conducted, in which the vendor comes under an express or implied obligation to part with the property to the highest bidder.³ The auctioneer is the agent of the vendor and the assent of both parties is necessary to make the contract binding; that is signified by the seller knocking down the hammer.⁴

1. *Galstoun v. Woomash Chandra*, (1917) 44 Cal. 789.

2. *Freeman on EXECUTIONS*, II. 1663.

3. *Dart on VENDORS AND PURCHASERS*, I. 198.

4. *Payne v. Cave*, (1789) 3 T.R. 149, cited in *Raja of Bobbili v. Suryanarayana Rao*, (1919) 42 Mad. 776 (783).

Where property is sold by Court, the auction-purchaser is one party to the contract, and the other party to the contract is not the judgment-debtor or the decree-holder, but the Court itself. In selling property the Court acts under the statutory powers given by the Code and not as the agent of any party, and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on the one side and the auction-purchaser whose bid is accepted on the other.¹

The function of a Nazir or other officer appointed to conduct an auction sale is of a ministerial character. If he conducts it in the presence of the presiding officer and the latter forthwith declares under Order 21, rule 64, C. P. Code who the purchaser is and signs the formal order the sale is complete. If it is not held in his presence, it can be completed only by his order closing the bidding or an order accepting the bid under rule 84. Where in anticipation of sanction the Nazir accepts the deposit required from the highest bidder, there is only in law an offer, and it is open to the Court to resume the auction.²

“The ordinary understanding in an auction sale is this. In the presence of the auctioneer who may be regarded as the acceptor, successive proposals are made for the purchase of the property. A makes the first offer and when that is succeeded by the offer of B; if A wants to purchase the property he must make a higher offer. Otherwise he walks out of the bargain. There may be C, D and E and

1. *Gangabattula Kantamma v. Manchiraju Reddipantulu*, (1924) 46 M.L.J. 134=78 I.C. 296.

2. *Jaibhadar Jha v. Matukdhari Jha*, (1923) 2 Pat. 518. See also *Rajendra v. Upendra*, (1915) 19 C.W.N. 633=27 I.C. 805.

so on who may bid higher than their immediate preceding bidders. It is the highest bidder that is regarded as having made the final proposal which may or may not be accepted by the auctioneer. If it is accepted the bargain is concluded." The procedure at a court-sale exactly corresponds to this description.¹

Deposits.

It is usual to receive deposits from intending bidders and in respect of such deposits, the auctioneer is a stakeholder for the vendor and the purchaser. It is his duty to hold it until the completion or revision of the contract and to pay it to the party ultimately entitled. But the vendor is liable for any loss of the deposit sustained by the auctioneer's insolvency or misconduct.²

The deposit is not only a payment by anticipation of part of the purchase-money, but also an earnest of the performance of the contract,³ and the purchaser cannot elect to forfeit it and avoid the agreement.⁴

Bids and bidders.

A bid is a mere offer and can be retracted by the bidder at any time before the auctioneer announces the completion of the sale, that is, before the fall of the hammer.⁵ A condition that no bid shall be retracted cannot probably be enforced.⁶

1. Per Seshagiri Iyer J, in *Raja of Bobbili v. Suryanarayana Rao*, (1919) 42 Mad. 776 (782).

2. See Halsbury's LAWS OF ENGLAND, I. 512.

3. *Howe v. Smith*, (1884) 27 Ch. D. 84; *Collins v. Stimson*, (1883) 11 Q.B.D. 143; *Soper v. Arnold*, (1889) 14 A.C. at 435.

4. *Crutchley v. Jerningham*, (1817) 2 Mer. at 506; *Palmer v. Temple*, (1839) 9 A. & E. at 520.

5. *Kenaram v. Kailash*, (1913) 18 C.L.J. 53=19 I.C. 904; *Raja of Bobbili v. Suryanarayana Rao*, (1919) 42 Mad. 776; *Joravarmull Champa Lal v. Jeyogopaldass*, (1922) 45 Mad. 799; *Mc Manns v. Fortesque*, (1907) 2 K. B. 1; *Payne v. Cave*, (1789) 3 T.R. 148.

6. *Warlow v. Harrison*, (1858) 1 E. & E. 295.

A bid lapses on the making of a subsequent higher bid or on the expiry of a reasonable time after the making of the bid without acceptance of the Court. If a bid is made and accepted in the lifetime of a bidder it is not annulled or withdrawn by his subsequent death. The contract having been completed in his lifetime, payment may be made or enforced afterwards and the appropriate evidence of his purchase executed.¹

If the bidder dies before acceptance of his offer, the bid becomes a nullity. In such a case the Court must not take up the previous bid and accept it but direct a fresh auction.²

A bid may sometimes be refused on the ground that the bidder is wholly irresponsible. This must be done only in a very clear case. In such a case, if an irresponsible party assumes to bid as the agent of another, the officer may inquire respecting his authority to do so, and is justified in refusing the bid, if the authority to make it does not exist.³

“ A bid may be withdrawn at any time prior to its acceptance. After the bid is accepted, the bidder has no right to withdraw it. Where, however, the bidding was made in the name of the plaintiff, by his agent, who, in bidding, exceeded his authority, by mistake, bidding more than he was authorised to bid, and more, in the aggregate, than he intended to bid, it was held that he might, on discovering his mistake, withdraw the bid.” “ The danger that the property when offered again may not be fairly sold is not so great as to outweigh the consideration that the

1. Freeman on EXECUTIONS, II, 1692.

2. See *Raja of Bobbili v. Suryanarayana Rao*, (1919) 42 Mad. 776.

3. Freeman on EXECUTIONS, II, 1692.

execution debtor ought not to be allowed to insist upon an unauthorised act of the agent and for the purpose of gaining the benefit of a mistake. The bid may be made by letter or other writing ; but if so, it must be publicly cried as are other bids. There must be no circumstance of fraud or collusion between the officer and the bidder, and the former must not have acted as the agent of the latter. The bid must be an unconditional cash bid ; for the bidder cannot impose or vary the terms of the sale. If a bidder undertakes to impose any condition to his bid not warranted by law or the decree of sale, it is thereby given such a character that the officer has no power to accept it, and should, therefore reject it and proceed to receive such bids as he is authorized to accept. If, for any cause, the highest bidder does not comply with the terms of the sale, or it appears that his bid, after being apparently accepted will not be carried into effect, or must be rejected, the property cannot be awarded to the second highest bidder, but a new sale must take place."¹

When a Court adjourns a sale fixed for a certain day to another date, with a view to get a higher offer for the property, it must be regarded not to have intended to accept the previous offer. This result would follow even if there are no higher bidders.² Certain property was put up for sale and the petitioner's offer of Rs. 9,000 was treated by the Nazir, who conducted the sale, as the highest. Immediately afterwards, it was represented to the Court that other persons were willing to bid for Rs. 15,000. The Court directed the sale to proceed

1. Freeman on EXECUTIONS, II. 1729.

2. *Raja of Bobbili v. Akella Suryanarayana*, (1919) 42 Mad. 776.

and the result was the opposite party was declared to be the purchaser. It was held that there was sufficient warrant for the procedure adopted by the Court, in the 3rd of the conditions of sale which are adopted as a part of the proclamation of sale (Form 29 Ap. E. Sch. I of the Civil Procedure Code) and that in the interests of justice High Court should not interfere.¹

Where a person goes to bid at a sale held in execution and in full knowledge of the conditions in the proclamation (App. E, Form 29, C. P. Code) offers bids for the property, and the property is knocked down to him, the mere fact that the Court has subsequently the discretion to confirm or annul the Nazir's auction does not leave it open to the bidder to withdraw his bid. Condition 3 of the proclamation of sale gives the Court a quasi-revisional discretion in the matter and does not require the Court itself to knock down the property.²

An order refusing a decree-holder to withdraw the bid which he had himself made and upon which the hammer had fallen does not adjudicate any right. It is not a decree and no second appeal lies.³

"From the provision to be found in the statutes of many of the States requiring property to be sold under execution to the highest bidder, and directing the sheriff to postpone a sale for want of bidders, it has been claimed that there can be no valid sale when no person other than the plaintiff in the writ or his agents were present, and, at all events, that the sheriff ought to adjourn the sale in such an

1. *Ashutosh Chatterjee v. Sudhindra Chandra*, (1911) 13 I.C. 597.

2. *Rajendra v. Upendra*, (1915) 19 C.W.N. 633=27 I.C. 805,

3. *Ibid.*

emergency. If it were necessary for the plaintiff to produce some bona fide bidder other than himself, it would often be impossible for him to enforce his judgment. Probably the officer is warranted in adjourning the sale where the bid offered is grossly inadequate, and its acceptance must result in a needless sacrifice of the defendant's property. The officer is not, however, justified in adjourning the sale solely on the ground that but one bidder is present, and there can be no doubt that the mere want of competition or of the presence of more than one bidder does not render a sale invalid, nor necessarily constitute any reason for setting it aside."¹

Where an agent holding an auction accepts the highest bid on behalf of his principal subject to the assent of the principal, there is a valid and enforceable contract on the assent being given. In the absence of a condition to the contrary a benamidar can bid at an auction.² It is not competent to one person to avail himself of the bid of another at a court-sale and constitute himself the purchaser by depositing the purchase-money; nor can the consent of the bidder improve the position.³

If an incompetent person (as a lunatic) is declared the highest bidder, the Court can hold the next bidder to his bidding or even allow him to stand as purchaser with the consent of parties to the cause.⁴ In one case, where the offer of the

1. Freeman on EXECUTIONS, II. 1668.

2. *Chitibabu Adinna v. Garmalla Jaggarayadu*, (1915) 28 M.L.J. 617=29 I.C.12.

3. *Shahzadi v. Ahmad Ali*, (1918) 21 O.C. 212=47 I.C. 993.

4. *Blackbeard v. Lindigren*, (1786) 1 Cox. 205; but *Quære*, whether the Court might not treat the case as one of an offer to purchase by private contract? SUGDEN, 14th Edn. 102.

highest bidder was rejected under the idea that he was of insufficient means and the next bidder was declared the purchaser, the Court did not treat the sale as void, but seemed to consider that the highest bidder should have moved that he instead of the other might be declared the purchaser.¹

If a sale has been actually completed the purchaser has a right of action maintainable without any written contract or memorandum of sale.² Where a sale is by its conditions a sale subject to a reserve price no contract is concluded, even when the property is knocked down to the highest bidder, if the highest bid is lower than the reserve price, and the highest bidder has no right of action.³ Subject to certain exceptions any person competent to contract has the right to insist on the reception of his bid.⁴

“An infant cannot be bound by his bid, because of his incapacity to contract. But, doubtless, in this, as in other cases, he alone can urge his incapacity. The purchaser must have capacity to receive and hold real estate. The right of a corporation to acquire and hold real property can generally be inquired into at the suit of the state only. In Minnesota, by whose statutes a county is a body politic and corporate having power ‘to purchase and hold for the public use of the county lands lying within its own limits,’ it has been adjudged that it has no capacity to acquire real property, except for public use, and that a purchase by the county of lands at execution sale, though under a judgment in its favor, is void, unless such lands were intended for the

1. *Hughes v. Lipscombe*, (1846) 6 Ha. 142.

2. *Johnstone v. Boyes*, (1899) 2 Ch. 73.

3. *Mc Manus v. Fortesque*, supra. See Halsbury's LAWS OF ENGLAND, I. 511.

4. Freeman on EXECUTIONS, II. 1692.

public use. A partner may purchase at a sale of the partnership effects or of the interest of another partner. His conduct in making such purchase must be free from suspicion. Neither the plaintiff nor any other person interested in the judgment is disqualified from purchasing. If pledged property is taken from the possession of the pledgee and sold under execution against the pledgor, the former is competent to bid and may become the purchaser of the property at such sale."¹

Co-sharer.

"Where the property sold is a share of undivided immovable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer."²

This rule is adopted from section 14 of Act XXIII of 1861 relating to Putteedari estates. If the plaintiff is himself a co-sharer his bid must be preferred to that of another co-sharer in the same mahal.³ His position was that he could advance his claim to pre-emption which would be adjudicated later on.⁴ To claim pre-emption the claimant ought to be a co-sharer or a member of the coparcenary at the date of the sale.⁵

A decree-holder who under Mahomedan law would be entitled to pre-emption cannot assert that right in a sale in execution of his decree.⁶ Where the judgment-debtor's rights in a putteedaree estate were sold and purchased by his son in the name of his father-in-law who was not a co-sharer and who

1. Freeman on EXECUTIONS, II. 1690.

2. C.P.C., O. 21 r. 88 (=Old Code, S. 310).

3. *Damodar v. Murari*, (1915) 12 A.L.J. 1148=26 I.C. 95.

4. *Syud v. Kalee Kumar*, (1866) 6 W.R. Mis. 3.

5. *Dwarka Prasad v. Ram Autar*, (1875) 7 N.W.P. 281.

6. *Sheik v. Kanje*, (1863) 1 Marsh 555.

after the sale waived his right in favour of the judgment-debtor, it was held that a co-sharer who had fulfilled requirements was entitled to pre-emption.¹ A person claiming pre-emption must sue to set aside the order confirming the sale in favour of an auction-purchaser and to have himself declared entitled to pre-emption and to be substituted for the auction-purchaser.² The defeasible title to a share in a patti does not give a right to pre-empt another share in the same patti as co-sharer.³

A co-sharer has to bid like any other bidder but an offer to abide by the sum offered by another bidder is sufficient.⁴ Where the right of the co-sharer is doubtful, the sale may be confirmed in favour of the other purchaser leaving the co-sharer to a remedy by suit.⁵

“ If the execution is for a joint debt which all the co-tenants are equally bound to discharge, there is more doubt of the right of any of the co-tenants to purchase at the sale. If a sale is made to either, under such circumstances, his co-defendants probably have the right to hold him as their trustee, and to require him to convey them their respective moieties on paying their shares of the moneys necessarily expended in effecting the purchase. Either of several judgment-debtors may purchase, at an execution sale, the property of his co-defendants. By such sale he acquires the title to their property,

1. *Gungaram v. Moola*, (1870) 2 N.W.P. 200.

2. *Shib v. Thika*, (1875) 7 N.W.P. 97. See *Badri Singh v. Tulsi Ram*, (1924) 79 I.C. 82.

3. *Abdul Ghafur v. Ghulam Husain*, (1913) 35 All. 296.

4. *Iqbal v. Ezaz*, (1916) 3 O.L.J. 405=36 I.C. 654 ; but see contra *Hira v. Unas*, (1881) 3 All. 827 ; *Tej Singh v. Govind*, (1880) 2 All. 850.

5. *Tasuduk v. Muksud*, (1874) 6 N.W.P. 272.

and they become vested with a cause of action against him to recover his share of the debt. If one of the judgment-debtors is, as between himself and another, a surety only, he may purchase the lands of his principal under an execution issued upon the judgment, and his title will be in all respects as valid and as free from other claims and encumbrances as if the purchase had been by one not a party to the action.¹

Capacity to
purchase.

“As a general rule, all persons, other than the officer conducting the sale and his deputies, are permitted to become purchasers, provided they are competent to contract, and do not occupy a relation with the defendant in which they will not be permitted to make their interests antagonistic to his. The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which inspires in the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability, in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede

1. Freeman on EXECUTIONS, II. 1687.

that of duty. It, therefore, prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another, that which he sells on his own account. In effect, he is not allowed to unite the two opposing characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."¹

Accordingly the C. P. Code enacts that no officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.² Under the Transfer of Property Act, "No Judge, legal practitioner, or officer connected with any Court of Justice, shall buy, or traffic in or stipulate for, or agree to receive, any share of or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person, claiming by or through him, any actionable claim so dealt with by him as aforesaid."³

Officers of
Court.

The provisions of the C. P. Code prohibit purchases by any officer or any person having a duty to perform in connection with any sale, but the terms of the Transfer of Property Act are wider. The effect of these provisions is to prohibit a pleader from purchasing a chose in action, but not to purchase property at court-sales or not to purchase decrees of

Pleader.

1. Freeman on EXECUTIONS, II. 1683.

2. O. 21 r. 73 (=Old Code, S. 292).

3. Act IV of 1882, S. 136. *Hari Lal v. Tripura Charan*, 1913) 40 Cal. 650; *Munnireddi v. Venkat Rao*, (1912) 37 Mad. 298.

Courts, because decrees are not choses in action.¹ A pleader's clerk does not come within these prohibitions. A pleader is not an officer within the meaning of Order 21, rule 73.²

But if a pleader purchases property at a court-sale held in execution of a decree, where he acts for the decree-holder, he cannot according to equity and good conscience retain for his own benefit the property so purchased by him.³ It was said in *Greenlaw v. King*,⁴ "The question is not whether there was fraud or no fraud, but whether the Court will permit a person standing in a fiduciary and confidential situation in which B was, to make himself an interested party in the very transaction which he, as trustee, was bound most vigilantly to superintend." This exposition of the law was adopted in *Subbarayudu v. Kotayya*.⁵

"An attorney having charge of the sale of real estate under execution cannot purchase the land for his own benefit, to the prejudice of his clients, or either of them. He cannot insist upon his purchase unless he paid an amount sufficient to satisfy his client's judgment. As the relation of client and attorney is necessarily a confidential one, the latter will not be permitted to maintain any attitude of hostility to the interests of the former and, hence,

1. *Subbarayudu v. Kotayya*, (1892) 15 Mad. 389; *Nagendra Bala v. Debendranath*, (1918) 22 C.W.N. 491=44 I.C. 13; *Govindarajulu v. Ranga Rao*, (1921) 40 M. L. J. 124=62 I.C. 255. The decision in *Goshain v. Chingunlal*, (1870) 2 N.W.P. 46; *Nundeeput v. Wiquhart*, (1868) 13 W.R. 209; *Syed Wajed v. Hafiz Ahmed*, (1872) 17 W.R. 480 were before the T.P. Act and are no longer law. See also *Sahibunnissa v. Abdul Gaffur*, (1916) 19 O.C. 60=34 I.C. 360.

2. *Alagirisami v. Ramanathan*, (1886) 10 Mad. 111.

3. *Aghorenath v. Ram Churn*, (1896) 23 Cal. 805.

4. (1833) 3 Beav. 49.

5. (1891) 15 Mad. 389.

if he makes any purchase in his own name, or for his own interest, his client will certainly be permitted to treat the attorney as having acted as his trustee, and hence is not at liberty to enforce any advantage apparently gained by the purchase. If the attorney for the plaintiff purchases the property at a sum sufficient to satisfy the judgment, this act can by no legal possibility prejudice the plaintiff, and the attorney may hold the purchase for his own benefit. If the attorney for the defendant makes a purchase, there is no doubt that he may enforce it as against all persons except his client, and hence, in a state where an execution or judicial sale has the effect of cutting off all other encumbrances, this effect cannot be denied to a sale because it was made to an attorney for the judgment-debtor. A sale may be vacated, when, being in partition, it was made to the attorney of all the parties, because it is against public policy to permit him, while having control of the sale, and the other proceedings, to assume a position which may induce him to sacrifice the interests of his client. Where a sale is made to an attorney, and is not vacated, we assume that it is incumbent on his client, wishing the advantage of the sale, to elect, within a reasonable time, to bear the burden of the sale and of discharging it by recompensing the attorney by repaying the amount of the bid and any other necessary expenditures."¹

"No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property."²

Decree-holder
and leave to
bid.

1. FREEMAN ON EXECUTIONS, II. 1687.

2. C.P.C., O. 21, r. 72 (=Old Code, S. 294).

An order refusing leave to bid is not appealable.¹

This rule applies only to the holder of the decree in execution of which the property is sold.²

A decree-holder applied for execution of his decree by sale of ginning factory belonging to his judgment-debtor. On the day of sale the bids did not go up beyond Rs. 5,000. The property had been valued by a panch at Rs. 40,000. Shortly after this first bid the judgment-debtor made an application to the Court stating that the property was worth Rs. 60,000. Subsequently the decree-holder made an application for leave to bid offering to buy the property for Rs. 20,000. The Court ordered that if the decree-holder was prepared to pay Rs. 40,000, his offer would be accepted. The decree-holder did not raise his bid to that amount and ultimately the Court disposed of the execution application on the ground there were no bidders. It was held that the Court should have granted the decree-holder leave to bid and made a further attempt for sale of the property and the order disposing of the execution application was set aside.³

Effect of
leave to bid.

“The effect of leave to bid is not, as has been sometimes erroneously supposed, to place the person obtaining leave in a fiduciary position toward the Court; such person assumes only the duties and obligations as to disclosure and good faith which are incumbent upon an ordinary purchaser from an ordinary vendor. It seems that leave to bid once

1. *Ko Tha Hnyin v. Ma Hnyini*, (1911) 38 Cal. 717 P.C.; *Motilal v. Fulchand*, (1924) 26 Bom. L.R. 770=83 I.C. 379.

2. *Maung Chit Hlaing v. N. A. R. M. Chetty Firm*, (1924) 2 Bur. L.J. 166=79 I.C. 747.

3. *Motilal v. Fulchand* (1924) 26 Bom. L.R. 770.=83 I.C. 379.

given, unless in time confined to bidding at a specific auction, removes the disability and puts the parties at arm's length as regards the property, so as to enable the person obtaining leave subsequently, and after failure of the auction to become the purchaser."¹

In *Woopendro v. Brojendro*,² it was said that "when liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside" and that "there was a duty incumbent on the appellant (purchaser) to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure it is impossible for the Court to exercise its discretion. The withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser". But in *Mahomed Mira v. Savvasi Vijaya Raghunada*,³ the Judicial Committee said that the rule as stated above was too sweeping in its terms and that a decree-holder who has obtained leave to bid at a judicial sale is in regard to restrictions upon him in the same position as any other purchaser. Their Lordships summed up the English Law as expressed in

1. *Coaks v. Boswell*, (1886) 11 Ap. Cas. 232; *Mahabir Pershad v. Macnaghten*, (1889) 16 Cal. 682 P.C.; *Mahomed Mira v. Savvasi Vijaya Raghunada*, (1899) 23 Mad. 227.

2. (1881) 7 Cal. 346.

3. (1899) 23 Mad. 227 (on appeal from 19 Mad. 315); *Satish Chandra v. Porter*, (1908) 36 Cal. 226.

Coaks v. Boswell,¹ "the Court of appeal stated the rule to be that a person whose position precluded him from purchasing (it was a solicitor in that case) must, when he applied for leave to purchase, either abstain from laying any information before the Court or must lay before it all the information he possesses. That rule is considerably narrower than the rule laid down by the High Court, and yet it seemed to the House of Lords to be too broadly stated. Lord Selborne held that it is not the duty of the applicant to give information which is not requested, and concerning which there is no implied representation positive or negative, direct or indirect, in what is actually stated. Lord Fitz Gerald states the rule with nearly equal caution though in an affirmative instead of a negative form:—"If he professes to give the court information on any particular subject with a view to guide its discretion and obtain its approval of the proposed sale, he is bound to lay before the court all the material information he possesses on that particular subject." Referring to the necessity of great caution in granting leave to bid as expressed by the High Court of Calcutta their Lordships added: "In this case," the Calcutta High Court dwelt on the necessity of great caution in granting leave to bid; indeed it laid down such conditions as would make the granting of leave a very rare thing instead of being a common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtors and they are applicable to a system in which the decree-holder has the conduct of the sale." The Code of Civil

1. (1886) L.R. 11 Ap. Cas. 232. Also *Warner v. Jacob*, (1370) 20 Ch. D. 220.

1. See *Sheonath v. Janki Prasad*, (1888) 16 Cal. 132.

Procedure throws the whole responsibility of conducting the sale on the Court.¹

Probably a mortgagee purchasing mortgaged property without leave may be deemed to have purchased as trustee for the mortgagors.² But leave to bid puts an end to the disability of the mortgagee and places him in the same position as an independent purchaser. There is no difference in this respect between the purchase by the mortgagee at a judicial sale of the equity of redemption only or of the mortgaged property.³ After leave to bid is granted, the mortgagee does not stand in a fiduciary position towards his mortgagor. He is at liberty to take out execution for any balance of the amount decreed that may be left after collecting the price for which the mortgaged property was sold and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.⁴

Where a mortgagor, having obtained a decree for damages against an assignee of the equity of redemption and having brought to sale the equity of redemption, purchases it himself with the leave of the Court under section 294, he is in the position of

1. See Madras Civil Rules of Practice, Rule 153.

2. *Kamini Debi v. Ramlochan Sirkar*, (1870) 5 B.L.R. 450. See *Subbaroyudu v. Kotayya*, (1892) 15 Mad. 389 (391); Indian Trusts Act (II of 1882, s. 90.)

3. *Mahabir v. Macnaghten*, (1888), 16 Cal. 682 P.C. (explaining above).

4. *Sheonath v. Janki Prasad*, (1889) 16 Cal. 132 [*Here Hari v. Tara Prasanna*, (1885) 11 Cal. 718 is distinguished on the ground that the case was between the mortgagee decree-holder and other creditors of the judgment-debtor. This distinction is not apparent. But the case seems to have been overruled by 16 Cal. 682 P.C. See *Gunga Pershad v. Jawabir Singh*, (1891) 19 Cal. 4]; *Muhammad v. Dharam*, (1895) 18 All. 31; *Parvati Charan v. Gobinda Chandra*, (1895) 4 C.L.J. 246.

an independent purchaser and the price which an independent purchaser must be taken to pay when he buys the property under mortgage for a cash payment made to the mortgagor on account of his equity of redemption is the cash payment for the equity of redemption *plus* the debt i.e., the amount undertaken to be paid to the mortgagee. He is therefore bound to give credit for these amounts.¹

Set-off when
allowed.

Where the decree-holder purchases with permission, the purchase-money and the amount due under the decree may be set off against one another, subject to the provisions of section 73,² that is, the amount to which he would be entitled on a rateable distribution may be so set off.³ The decree-holder must apply to the Court for leave to set off. The liberty of set-off is not to be had as a matter of right and the purchaser, be he a decree-holder, may be asked to deposit the price, in order to facilitate rateable distribution. Even under the old Code where the expression of the rule was not quite clear, it was said "while section 294 is applicable as between the purchasing decree-holder and the judgment-debtor and for convenience allows the former ordinarily to set off the purchase-money against his decree, instead of paying the money into Court and drawing it out again, the section must be taken as subject to the provisions of section 295 in cases in which there are competing decree-holders who have applied for execution."⁴ When the sale price has

1. *Krishnasami v. Janakiammal*, (1894) 18 Mad. 153. See *Sesha v. Krishna*, (1900) 24 Mad. 96.

2. *Arunachellam v. Somasundaram*, (1921) 12 L. W. 328 = 59 I.C. 86.

3. *Hazarimal v. Namdev*, (1908) 32 Bom. 379.

4. *Srinivas v. Radhabai*, (1882) 6 Bom. 570; *Viraraghava v. Varada*, (1882) 5 Mad. 123; *Taponidi v. Mathura*, (1886) 12 Cal. 499; *Sorabji v. Govind*, (1891) 16 Bom. 91 (102).

been allowed to be set off by mistake in ignorance of claims for rateable distribution, the purchaser can be compelled by a summary process in execution to refund the portion claimable by other attaching creditors.¹

The purchaser must ordinarily deposit the money in Court, but the sale should not be set aside for default, if all the parties interested waive their right to have the deposit made.² An assignee of a decree under an oral assignment does not require leave to bid at a sale.³ A decree the satisfaction of which has resulted from the decree-holder himself bidding the full amount of the decree at the sale is not actually satisfied until the sale is confirmed under rule 92.⁴ If therefore the decree carries interest, the decree-holder is entitled to claim interest between the date of the sale and the date of confirmation.⁵

“Where a decree-holder purchases, by himself or through another person, without such permission the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale by order set aside the sale; and the costs of such application and order and any deficiency of price which may happen on resale and all expenses attending it, shall be paid by the decree-holder.”⁶ When a mortgagee has

Absence of leave.

1. *Madden v. Chappari*, (1888) 11 Mad. 356. See also *Sree Krishna Doss v. H. Chandook Chand*, (1908) 5 M.L.T. 125.

2. *Gopal v. Roy Bunwaree*, (1879) 5 C. L. R. 181.

3. *Dakshina v. Basumati*, (1900) 4 C.W.N. 474.

4. *Ganesh v. Purushottam*, (1908) 33 Bom. 311.

5. *Khalil v. Gokul*, (1919) 41 All. 526.

6. C.P.C., O. 21, r. 72 (3) (=Old Code, S. 294); *Saradindu v. Gosta Behari*, (1923) 27 C.W.N. 208=75 I.C. 196; *Uttam Chandra v. Rai Krishna Dalal*, (1920) 47 Cal. 377 F.B.; *Rai Radha Krishna v. Bisheshar*, (1922) 1 Pat. 733 P.C.; *Ramachandra v. Gajanan*, (1920) 44 Bom. 352.

purchased the equity of redemption in contravention of the provisions of section 99 of the T. P. Act, it should not be presumed in the absence of evidence that the Court granted leave to bid.¹ Where the holder of a mortgage decree was refused leave to bid for the mortgaged property at the execution sale, but nevertheless purchased it benami, it was held to be an abuse of the process of Court and the sale was set aside.² Similarly, when leave to bid was granted at a certain price, but the decree-holder purchased the property in the name of another person for a less price, his act constituted a fraud and vitiated the sale³ and the fact that the decree-holder associated with himself a stranger would not validate the sale, when the bid is a joint one and the interest of the decree-holder cannot be separated.⁴ When, therefore, leave to bid was granted on condition that a certain sum due to a prior charge-holder should be paid into Court but the decree-holder purchased the property at the sale without fulfilling the condition it was held that the Court had power, apart altogether from Order 21, rules 72 and 92, to refuse to confirm the sale under rule 86 or under its inherent power.⁵

A purchase without the leave of the Court by the decree-holder or any one on his behalf is not *void ab initio* but only voidable at the instance of the judgment-debtor or other person affected by the

1. *Uttam Chandra v. Rai Krishna Dalal*, (1920) 47 Cal. 377 F.B.

2. *Mahomed v. Ram Lall*, (1884) 10 Cal. 757.

3. *Srimati Sarat Kumari v. Nimaichuran*, (1900) 5 C.W.N. 265.

4. *Raj Kuar v. Chunnoo*, (1912) 16 O.C. 86 = 15 I.C. 888.

5. *Janakbati Chaudhrani v. Rameshwar Singh*, (1922) 1 Pat. 235.

sale.¹ It is not a case of nullity of the sale for want of jurisdiction but one merely of irregularity of procedure.² Such a sale only gives the judgment-debtor the right to object to the sale and have it set aside and when no such objection is taken, the purchase is as valid as if the leave of the Court has been obtained.³ "It cannot be attacked or overthrown by third parties. Neither can the heirs or other parties in interest treat it as unqualifiedly void. They may confirm it either directly or by their non-action continued for a long period of time after having notice of the true nature of the transaction,"⁴ and here in India by not making an application to set aside the sale in the manner provided by the C.P. Code.

But it is not necessary that the judgment-debtor should have previously applied to the Court under this rule and section 47 to set aside the sale. If a defendant would in a suit brought or application made by him be entitled to a relief which would be a complete answer to the plaintiff's claim, then as a defendant he is entitled to put forward his claim unless he is estopped or otherwise barred. The written statement of the judgment-debtor may be treated as an application to set aside the sale. The sale may be set aside even after confirmation.

Plea may be raised in defence to action.

1. *Javherbai v. Haribai*, (1881) 5 Bom. 515; *Chintamanrao v. Vithubai*, (1887) 11 Bom. 588; *Gopalchunder v. Ram Lal*, (1894) 21 Cal. 554; *Paramasiva v. Krishna*, (1891) 14 Mad. 488; *Motilal v. Ramdoyal*, (1909) 1 I. C. 645; *Saradindu v. Gosta Behari*, (1923) 27 C.W.N. 208=75 I.C. 196.

2. *Ganesh v. Gopal*, (1917) 41 Bom. 357.

3. *Martand v. Dhondo*, (1897) 22 Bom. 624 (628); *Gadadhar v. Midnapore Zamindari Co. Ltd.*, (1913) 16 C. L. J. 141=17 I. C. 126.

4. Freeman on VOID JUDICIAL SALES, 120. See *Surajman v. Charan*, (1882) A.W.N. 26.

Section 244 (now 47) bars a suit brought for the determination of certain questions, but does not bar the trial of an issue involved in these questions, if the issue is raised at the instance of a defendant in a suit brought by him.¹ Where a decree-holder purchases property without leave and the judgment-debtor seeks to set aside the sale, it is unnecessary for the latter to allege fraud or that the property has not been sold for its proper value; it is for the decree-holder to satisfy the Court that the sale should be confirmed. Such was the view of Miller and Sankaran Nair JJ., but Abdul Rahim J. took a contrary view: "It is a well established rule of law that a party relying upon fraud, either as the basis of his action or as a defence to a suit must plead it in distinct terms, so that the party whose act is impeached as fraudulent may have full notice of the charge he has to meet. The restriction imposed on the decree-holder buying the property of the judgment-debtor in execution of his decree is the creation of a statute and the Court cannot attach to the disregard of a rule like this consequences other than those contemplated by the legislature."²

When once it is seen that a purchase without leave is only voidable, it follows that it is discretionary with the Court of execution to set aside the sale. In dealing with such a case which is merely an irregularity in conducting the sale, Courts will, before interfering with such a sale, consider whether

1. See also *Bhiram v. Gopi Kanth*, (1897) 24 Cal. 355. *Sara-dindu v. Gosta Behari*, (1933) 27 C.W.N. 208=75 I.C. 196.

2. *Thathu Naick v. Kondu Reddi*, (1909) 32 Mad. 242 F.B.; *Kondapatti Tatireddi v. Rama Chandrarao*, (1921) M.W.N. 535=62 I.C. 854.

any substantial injury has resulted to the judgment-debtor by reason of it.¹

The question whether the sale should be set aside or not on the ground of leave to bid is one relating to execution of the decree within the meaning of section 47 and must be decided by the Court executing the decree and not by a separate suit.² A suit by judgment-debtor to set aside a court-sale, on the ground that the sale proceedings had been secretly brought about without his knowledge and that the certified purchaser under the sale was a mere benamidar for the decree-holder who had no leave to bid, was held not maintainable.³ An appeal lies from an order setting aside or refusing to set aside a sale under this rule⁴ but no appeal lies from an order setting aside or refusing to give a decree-holder's permission to purchase at the court-sale.⁵

“ Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on

Interval after
proclamation.

1. *Mathura Das v. Nathuni Lall*, (1885) 11 Cal. 731 ; and see also *Gopal Chunder v. Ram Lal*, (1894) 21 Cal. 554 (558). For a contrary opinion as to burden of proof, see *Thathu v. Kondu*, (1909) 32 Mad. 242, *per* Sankar Nair J.

2. *Genu v. Sakharan*, (1896) 22 Bom. 271 ; *Viraraghava v. Venkata*, (1892) 16 Mad. 287.

3. *Durga v. Balwant*, (1901) 23 All. 478.

4. C.P.C., Or. 43 r. 1 (j). No second appeal lies, see *Bhagvut v. Narku*, (1894) 21 Cal. 789.

5. *Jodoonath v. Brojo Mohan*, (1886) 13 Cal. 174 ; *Ko Tha v. Ma Huin*, (1911) 38 Cal. 717 P.C. See also *Durga Sundari v. Govindachandra*, (1883) 10 Cal. 368 ; *Bachni v. Charuchander*, (1883) A.W.N. 104.

which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale."¹

Adjournment
of sale.

"(1) The Court may in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment; Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it."²

In granting an adjournment of the sale the Court exercises its discretion. It considers the interest of the judgment-debtor as well as of the decree-holder but the provisions of this rule should be strictly followed.³ The Court can adjourn the sale to a future date in order to have a better sale in the event of want of bidders or for any other similar reason,⁴ even after a few lots have been sold and the rest are unsold.⁵ For an adjournment of the sale, an order of Court is necessary and where the sale though conducted in the precincts of the court-house was adjourned to another date without an order of Court, the sale was irregular.⁶ Adjourn-

1. C P.C., O. 21, r. 68 (=Old Code, S. 290).

2. *Ibid.*, r. 69 (1) & (2) (=Old Code, S. 291).

3. *Venkatasubbaraya v. Zamindar of Karvetnagar*, (1896) 20 Mad. 159.

4. *Shyam v. Sundar*, (1904) 31 Cal. 873.

5. *Raja of Kalahasti v. Raja Venkataramiah*, (1914) M.W.N. 873=26 I.C. 273.

6. *Alayakkammal v. Arunachala*, (1902) 12 M.L.J. 97. See *Vaduganathan v. Fox*, (1913) 6 Bur. L.T. 65=20 I.C. 192.

ments of sales should be for specified day and hour.¹ The sale need not be closed on the first day.² It may continue from day to day for any length of time and the limit of seven days given for an adjournment does not apply to it. Where several properties are placed for sale on the list, postponement of the sale of any particular property from the commencing day to a later day is not an adjournment for the purpose of this rule.³

But where the sale is stopped and adjourned for a longer period than seven days, the provision made for fresh proclamation should be followed.⁴ Where there is a series of short adjournments less than seven days which taken together in the aggregation amount to more than seven days, a fresh proclamation is necessary.⁵ A sale proclamation fixed 13th July 1903 for the sale and it was notified that in the absence of any order of postponement the sale would be held at the monthly sale commencing on 13th July 1903. Owing to the absence of the Judge from the station the monthly sales did not begin till the 17th July and the sale actually took place on the 20th July. It was held that in the circumstances of the case no fresh proclamation was necessary and even assuming there was any irregularity in publishing the sale, no substantial injury had been caused by it.⁶

1. *Venkata Subbaraga v. Zamindar of Karvetnagar*, (1896) 20 Mad. 159; *Bhikari Misra v. Rani Surja* (1902) 6 C.W.N. 48; *Pran Singh v. Janardhan Singh*, (1912) 14 C.L.J. 541=13 I. C. 337.

2. *Jaistee Ram v. Bijai*, (1873) 5 N.W.P. 177.

3. *Lal Mohun v. Nunu*, (1889) 17 Cal. 152.

4. *Venkata Subbaraya v. Zamindar of Karvetnagar*, (1896) 20 Mad. 159; *Moti Singh v. Prithipal*, (1914) 25 I.C. 17.

5. *Jaminimohan v. Chandra Kumar*, (1902) 6 C.W.N. 44.

6. *Rang Lal v. Ravaneshwar*, (1911) 39 Cal. 26 P.C.

Where a sale did not take place on the first day, being a Sunday, and on the next day, being a public holiday, and the sale was knocked down on the third day without any fresh proclamation, it was held that there could not be a much graver irregularity than to fix the sale for a day on which the sale could not be held, that there were no proceedings for the first and the second day and such as are contemplated by section 291 and consequently the sale held on the third day was irregular and illegal and there was a strong presumption that the price realised must have been affected by the irregularity.¹

Where a stay of proceedings is removed, a fresh proclamation is necessary for a new sale. After an adjournment of sale *sine die*, if a sale is held without a fresh proclamation, it is a mere irregularity and the sale will be set aside if substantial injury results from it.²

Waiver of
proclamation.

The judgment-debtor may waive the need for a fresh proclamation. But where there are several judgment-debtors, all of them must join in the waiver. A guardian ad litem of a minor judgment-debtor can in good faith waive a fresh proclamation and have the sale adjourned.³ An application on the day of sale by the judgment-debtor that a portion only of the advertised property may be sold would not amount to a 'consent' so as to dispense

1. *Brij Nandan v. Dal Daput*, (1886) A.W.N. 127.

2. *Gujramati v. Saiyid*, (1906) 29 All. 196 P.C.; *Abdul Hakim v. Nga Nigri*, (1923) 2 Bur. L. J. 54=75 I.C. 343; *Rang Lal v. Ravaneshwar*, (1911) 39 Cal. 26 P.C.; *Kirpal Singh v. Kedar Nath*, (1917) 3 Pat L.W. 357=41 I.C. 68; *Official Liquidator v. Sanj Narain Singh*, (1921) 43 All. 433; also *Moti Singh v. Prithipal*, (1914) 25 I.C. 17.

3. *Bepin Behary v. Jotindar*, (1910) 37 Cal. 897.

with the need for a fresh proclamation.¹ A waiver, on an application for postponement of an execution sale by the judgment-debtor, of a fresh proclamation does not amount to a waiver of objections to the previous one.²

“Every sale shall be stopped, if before the lot is knocked down, the debt and costs (including the costs of the sale are tendered to the officer conducting sale or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.”³

Stopping sale on payment.

Under this rule a mortgagor judgment-debtor can pay off the decree-debt and stop the sale, even though the period fixed under the preliminary decree for redemption is past and a final decree has been declared.⁴ A payment made to prevent a sale is not voluntary whether made by the judgment-debtor or a third party claiming the property.⁵

Where the properties of the judgment-debtor were sold in three lots and after the sale of two lots, the judgment-debtor tendered to the selling officer the balance of the decree-amount after deducting the amount of the bids for the two lots, a sale of the third lot was not vitiated by irregularity or illegality and could not be set aside to the prejudice of a bonafide auction-purchaser. The words “the debt and costs” in clause 3 do not mean the balance of

1. *Hurbans v. Bhairo Pershad*, (1879) 5 Cal. 259.

2. *Rudrananda v. Prithichand*, (1912) 14 C.L.J. 346=11 I.C. 438,

3. C.P.C., O. 21 r. 69 (3) (=Old Code, S. 291).

4. *Bibijan v. Sachi*, (1904) 31 Cal. 863; *Misri Lal v. Mithu Lal*, (1906) 28 All. 28.

5. See Indian Contract Act (IX of 1872), S. 69; *Fatima Khatoon v. Mahomed*, (1868) 12 M I.A. 65; *Omroto Lal v. Ramdhun*, (1872) 18 W.R. 503.

the decree-debt and costs which would remain if by a legal fiction the sales of previous lots (not yet completed by the payment of the whole purchase money) were taken as completed by treating the whole of the purchase money as actually paid up.¹

Where an execution sale is postponed on the ground that the decree has been satisfied this has no application.²

Sale of
agricultural
produce.

Where the property to be sold is agricultural produce the sale shall be held,—

- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or,
- (b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it and
- (b) the owner of the produce or a person authorised to act in his behalf applies to have the sale postponed till the next day, or, if a market is held at the place of sale, the next market-day,

1. *Raja of Kalahasti v. Raja Venkataramiah*, (1914) M.W.N. 873=26 I.C. 273.

2. *Jagdhari Rai v. Langat Gope*, (1923) 4 Pat. L.T. 495=75 I.C. 676.

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce."¹

(1) "Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing. (2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land and to do all that is necessary for the purpose of tending and cutting or gathering it."²

"Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker."³ But a sale through a broker is not obligatory.⁴

Sale of negotiable instruments etc.

1. "Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold."

Payment of price in the case of moveables.

2. On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

3. Where the moveable property to be sold is

1. C.P.C., O. 21, r. 74.

2. C.P.C., Or. 21, r. 75.

3. *Ibid.* r. 76.

4. *Baboo Luchmcepat v. Lekraj*, (1867) 8 W.R. 415.

a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.”¹

In the case of sales of moveable property, the officer has got the discretion to allow the price to be paid within a reasonable time.² Where goods offered for sale in execution of a decree are described as of a particular denomination and every circumstance points to the buyer having contracted for the specific goods produced as described, and the goods tendered do not answer that description, the purchaser is entitled to reject them and, if he has paid for them to recover the price as money had and received for his use.³

Irregularity
in sale of
moveables.

“No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.”⁴

Money is not moveable property within the meaning of this rule.⁵ The sale of arms by a Nazir is excluded from the operation of the Indian Arms Act.⁶ An omission or over-statement of the decree amount,⁷ or non-service of the notice of

1. C.P.C., O. 21 r. 77 (=Old Code, S. 297).

2. *Shah Fareed v. Sheo Charan*, (1872) 4 N.W.P. 37.

3. *Tukaram v. Deoji*, (1920) 54 I.C. 315.

4. C.P.C., O. 21, r. 78 (=Old Code, S. 298).

5. *Maung Lun Bye v. Maung Po Nyun*, (1924) 1 Rang. 360.

6. *Wala Hiraji v. Hira Patil*, (1885) 9 Bom. 518.

7. *Kasse Nath v. Hullodhur*, (1865) 2 W.R. 60.

sale on the judgment-debtor,¹ is not an irregularity. If the sale proclamation warrants a title, the injured party may apply to set aside the sale,² as it is not a mere irregularity.³ The sale cannot be set aside, after it is complete.⁴ The owner can follow the property in the hands of the purchaser,⁵ or sue the decree-holder for its value.⁶ Though under this rule, a judgment-debtor can sue for compensation for injury caused to him on account of an irregularity in publishing or conducting the sale of moveable property; that section must be read with Section 47, which bars a separate suit regarding any question arising between the parties in execution.⁷

“(1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold. Deposit of 25%.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.”⁸

As a general rule, no bidder can be asked to deposit money in advance, or to display his funds, before his bid is made and accepted finally, but if

-
1. *Chutter v. Dhurram*, (1869) 1 N.W.P. 1.
 2. *Romesh v. Jodab*, (1866) 6 W.R. 14.
 3. *Framji v. Hormasji*, (1877) 2 Bom. 259.
 4. *Hukam Chand v. Ganga Ram*, (1919) P.R. 12=49 I.C. 140.
 5. *Mohammad v. Akial*, (1868) 9 W.R. 118.
 6. *Kanaye v. Hurchand*, (1870) 14 W.R. 120.
 7. *Atmaram v. Gulab*, (1886) P.R. 14.
 8. C.P.C., O. 21 r. 84 (=Old Code, S. 306).

the selling officer has reason to suspect sham biddings, to frustrate the sale he will be justified in inquiring into the trustworthiness of the bidders before accepting his bid.¹ It often happens in practice, that decree-holders, in their anxiety to conclude the sales, set up nominal bidders, to swell the list of bidders so as to induce the Court to believe that there was a wide publicity and the price offered must be fair, and in such cases the selling officer will be justified in satisfying himself of the good faith of the bidders to determine whether there was a fair demand and the sale could be knocked down. A sham bidder is liable for prosecution under section 228 of the Indian Penal Code.²

Failure to
deposit.

If the decree-holder has no leave to set off the purchase money under Order 21, rule 72 he must like any other purchaser deposit the advance, but when all parties waive the deposit, the sale cannot be set aside.³ A failure to deposit the advance is at best only an irregularity and does not vitiate the sale, according to the High Courts of Madras and Calcutta,⁴ but according to the High Court of Allahabad⁵ there is no sale at all and there can be no confirmation of such sale.

The distinction was pointed out in *Mahomed v. Kilaria*.⁶ A sale is no sale unless the price is paid. So where the deposit was never paid at all, there

1. *Rajah Muhesh v. Kishanund*, (1862) 9 M.I.A. 324.

2. *Gopal v. Roy Bunwaree*, (1879) 5 C.L.R. 181.

3. *In re Mohesh Chunder*, (1864) W.R. Mis. 3.

4. *Venkata v. Sama*, (1891) 14 Mad. 227; *Bepeen v. Pureshnath*, (1882) 9 Cal. 98; *Bhim Singh v. Sarwan*, (1888) 16 Cal. 33; *Raman v. Olagappa*, (1906) 3 L.B.R. 225; *Inaitullah v. Punjab National Bank Ltd.*, (1922) 67 I.C. 427.

5. *Intizan v. Narain*, (1883) 5 All. 316; *Amir Begam v. Bank of Upper India*, (1908) 30 All. 273.

6. (1911) 15 C.W.N. 350=9 I.C. 66.

could be no sale under the Code, because the Court has no power to sell property to a person who does not pay for it. But if the deposit is made, though subsequently¹ and not at once as required in section 306, it may amount only to an irregularity in the conduct of the sale and it can be inquired into by an application under Order 21 rule 90 or section 47. In the former case, the remedy is by a separate suit and a suit will lie to set it aside as it is not merely an irregularity remediable by an application under Section 47.

So where upon failure to make such deposit the property was subsequently—but not 'forthwith'—put up again to auction, and sold for a less price, it was held that the first sale was no sale at all and that the decree-holder was not entitled to claim under section 293 compensation for loss on re-sale from the first purchaser.²

The officer conducting a sale has no authority to extend the time for payment of 25% of the price and it must be paid immediately.³ Though it is not open to the Court to extend the time for payment of the purchase price without the consent of the parties, still where an extension of time has been granted without objection on the part of the parties and the sale has been confirmed and the money drawn by the decree-holder, the sale cannot be set aside on account of the irregularity.⁴

1. As in *Ahmed v. Lalta*, (1905) 28 All. 238; *Bhim v. Sarwan*, (1888) 16 Cal. 33; *Inait Ullah v. The Punjab National Bank*, (1922) 67 I.C. 427.

2. *Amir Begam v. Bank of Upper India Ltd.*, (1908) 30 All. 273; *Ali v. Ali*, (1915) 2 O.L.J. 230=30 I.C. 230.

3. *Ali v. Ali*, (1915) 2 O.L.J. 216=30 I.C. 230.

4. *Varanakkot Illath Subrahmanyam Nambudri v. Vykunda Kammathi*, (1923) 43 M.L.J. 477=69 I.C. 1001.

On 22nd August property was put up for auction, but the deposit of 25% of the price was made only on 28th August. The sale was confirmed on 23rd September. The judgment-debtor applied under rule 89 on 26th October as the Court was closed between 24th September and 25th October. It was held that the auction-sale was concluded on 28th August and the application to set aside the sale was in time and that the Court was not precluded by the *ex parte* order of confirmation from accepting the deposit and setting aside the sale. For the mere making of the last bid does not conclude the sale and for the conclusion of the sale, it is necessary for the officer to accept the final bid and to make a declaration as to who is the purchaser and to order him to pay over 25% of the purchase-money.¹

Resale.

Where the deposit is not made immediately after the declaration of the acceptance of the final bid, the property shall *forthwith* be resold and no fresh proclamation of the time of the sale is necessary.² The putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit.³ But when, as it often happens, all the bidders go away, on the impression of a completed sale and the failure to make the deposit is discovered too late, the selling

1. *Munshi Lal v. Ramnarain*, (1913) 35 All. 65. See also *Jaibhadar Jha v. Matukdhar Jha*, (1923) 2 Pat. 548.

2. *Vallabhan v. Pangunni*, (1889) 12 Mad. 454.

3. *Vallabhan v. Pangunni*, (1889) 12 Mad. 454; *Rajendra v. Ramcharan*, (1898) 2 C. W. N. 411; *Ramendranath v. Mt. Hikait Kher*, (1919) 51 I.C. 316.

officer will not be bound to resell forthwith, for such resale means nothing and will be of no avail.¹ In such a case, the sale comes to an end and cannot be resumed without the usual proclamation. In beginning to sell again in default of deposit the selling officer is not bound to commence from the next highest bid below that of the defaulter, unless that bidder abides by that bid.²

“ The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property : Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.”³

Payment of full price

Payment of the price before the day fixed is imperative.⁴ In computing the fifteen days allowed for payment, the day of the sale is excluded ;⁵ and in default of payment the Court may forfeit the deposit to the Government and order the resale.⁶ Payment into Court will include payment into the Government Treasury under the Rules of Practice,⁷ and if therefore the money is brought into Court in time and steps are taken for actual payment into treasury, there is a sufficient compliance though the money does not actually reach the treasury on the day.⁸ But a remittance by post will not be sufficient,

1. *Bhim Singh v. Sarwan*, (1838) 16 Cal. 33.

2. *Gour Mookh v. Lalla Gour*, (1864) 1 W.R. Mis. 11.

3. C.P.C., O. 21, r. 85 (= Old Code, S. 307).

4. *Sambasiva v. Vydinada*, (1902) 25 Mad. 535.

5. *Javherbai v. Haribai*, (1884) 5 Bom. 575 ; *Ramadhani v. Rajrani*, (1881) 7 Cal. 337 ; *Vallabhan v. Pangunni*, (1889) 12 Mad. 454.

6. *Asuane v. Koorban*, (1868) 3 Agra 204.

7. *Srinivasa v. Malayacha*, (1883) 7 Mad. 211.

8. *Gujadhar v. Naik*, (1882) 8 Cal. 528.

if it does not reach the Court before the day fixed, as the post office is not agent of the Court.¹ Where on the last day limited for payment the Court is closed for a holiday payment is receivable the next day.² Where a stranger auction-purchaser withdraws his deposit made under rule 85 on the sale being set aside by the first Court and when the sale was upheld on appeal, he repaid the money and asked for confirmation of his sale, it was contended that by the purchaser withdrawing the money from Court the contract of purchase came to an end and that it could not be revived by the order restoring the sale on appeal; it was held that nothing being shown as to the consent of the judgment-debtor or decree-holder to put an end to the contract the withdrawal of the money did not have that effect and that the analogy of rule 85 would not apply to the repayment of the money by the purchaser in these circumstances and his payment was in time.³

A decree-holder if he becomes the purchaser is bound to bring into Court whatever balance may be due on foot of the purchase-money after deducting the amount due to him under the decree and in default of payment, there must be a re-sale.⁴ In such a case the judgment-debtor is entitled to credit for the full amount bid for his property at the time of the first sale, but the decree-holder does not forfeit thereby any of his rights under the decree.⁵

When a decree-holder is permitted to bid at an

1. *Ramachandra v. Subrao*, (1895) 22 Bom. 415.

2. See the General Clauses Act (X of 1897) S. 10. For office open on holidays, see *Motiram v. Bivraj*, (1895) 20 Bom. 745.

3. *Shenbagamuthu v. Vaduganatham*, (1917) M.W.N. 861 = 42 I.C. 552.

4. *Ramendra v. Hikait*, (1919) 51 I.C. 316.

5. *Joobraj v. Gour Buksh*, (1861) 7 W.R. 110.

auction-sale, subject to certain conditions being fulfilled and those conditions turn out not to have been fulfilled, the Court can, apart altogether from order 21 rules 72 and 92, either under rule 86 or under its inherent powers refuse to confirm the sale and have a resale.¹

An order setting aside a sale in default of payment of the purchase-money by the auction-purchaser is not appealable.²

“ In default of payment within the the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.”³

Forfeiture of deposit.

This rule does not apply to a postponement of sale or to a sale held forthwith,⁴ on default of the preliminary deposit under rule 84.⁵

The forfeiture of deposit was obligatory under the previous Codes,⁶ but the Court has now a discretion to do it. The Court must for good cause shown exercise the discretion in his favour.⁷

The provisions of this rule are intended to prevent the delay and waste of labour which may arise from persons thoughtlessly entering into or wantonly abandoning contracts of sale formally con-

1. *Janakvati v. Rameshwar*, (1922) 1 Pat. 235.

2. *Katori v. Ajudhia*, (1920) 2 U.P.L.R. 81=58 I.C. 597.

3. C.P.C., O. 21, r. 86 (=Old Code, S. 308).

4. *Budreenath v. Rajah Chunder*, (1864) 1 W.R. Mis. 3.

5. See page 464 *supra*.

6. See *Sambasiva v. Vydinada*, (1902) 25 Mad. 535.

7. *Ganpat Rao v. Kesari Chand*, (1921) 17 N.L.R. 15=59 I.C. 705.

ducted by public servants and the only cases in which relief from the liability incurred from such formal proceedings can be accorded under the Code are cases in which, owing to the circumstances beyond the control of the purchaser, the sale has been set aside by the Court or proved entirely infructuous. Hence a mere abandonment of sale in execution proceedings without due reason given is no ground for dispensing with the enforcement of the penalty which attaches under this rule of the Code not on the holding of a second sale, but as a deterrent to prevent a default which renders nugatory the formal proceedings already held.¹

So where an auction-purchaser applied to get a refund of the purchase-money deposited into Court required under rule 84, upon the sale having been set aside upon deposit of the decree amount under rule 89 and the Court refused the refund as the balance of the purchase money was not paid and forfeited the same to the Government, it was held that it was an improper exercise of the discretion against the auction-purchaser.² When at the Court-sale the purchaser failed to pay the balance in time and the property was resold and was purchased by the decree-holder who also applied for attachment of the deposit of 25% made by the first purchaser, owing to deficiency in re-sale, it was held that the application was proper and must be disposed of according to law.³ There is no appeal from an order of forfeiture.⁴

Where, before the time fixed for completion

1. *Tulsigiriappa v. Fakirayya*, (1900) 2 Bom. L.R. 901.

2. *Mathuraprasad v. Gawri Shankar*, (1910) 32 All. 380.

3. *Ramagirji v. Annavajjhula Venkatachalam*, (1925) 48 M.L.J. 335=86 I.C. 373 P. C.

4. *Sawan v. Maya*, (1891) P.R. 120.

the purchaser became bankrupt, and his assignees declined to complete, the Court held that the deposit was forfeited, and made an order for resale; but refused to make it without prejudice to any right which the vendors might have against the bankrupt or his assignees, in the event of a less price being obtained.¹ Where the contract is inequitable² or where to enforce it would be attended with great hardship as in the case of a sudden and violent change in the money market³ or where the purchaser has by mistake given an unreasonable price for the estate⁴ or is expeditious in applying to the Court⁵ he will, according to some authorities, be allowed to forfeit his deposit (if any), and abandon the contract; but this will not be conceded on the mere ground of the price being excessive,⁶ nor in the case of a person without authority buying the estate to prevent a sale at an under-value,⁷ nor, it is conceived, under any ordinary state of circumstances.⁸

“ Any deficiency of price which may happen on a resale by reason of the purchaser’s default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale and shall, at the

Recovery of
deficiency on
resale.

1. *Depree v. Bedborough*, (1863) 33 L.J. Ch. 134; *Moeser v. Wisker*, (1875) 40 L.J. C.P. 94.

2. *Sugden*, 14th Edn. 119. *Dan. Ch. Pr.* 7th Edn. 887.

3. *Savile v. S.*, (1721) 1 P.W. 745.

4. *Morshed v. Frederick*, cited with disapproval. *Sugden*, 14th Edn. 120; *Coote v. Coote*, (1840) 2 Ir. Eq. R. 159.

5. See *Price v. North*, (1837) 2 Y. & C. 620.

6. *Re Birch*, *Sug.* 14th Edn. 119.

7. *Nelthorpe v. Pennyman*, (1808) 14 Ves. 517; *Exp. Tomkins*, *Sugd.* 14th Edn. 120.

8. *Dart on VENDORS AND PURCHASERS*, II. 1190.

instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money."¹

This rule gives power to the Court, at the instance of the judgment-debtor, to collect in a summary manner by way of execution the deficit that has been caused from the person bidding.² Whether there is default in payment of the initial deposit of 25 per cent of the purchase price under O. 21, r. 84 or in the deposit of the balance under O. 21, r. 85, whether the sale is by Court or by the Collector,³ the property may be resold and the deficiency of price recovered from the defaulting purchaser.⁴ A defaulting purchaser is liable for loss and expenses on a resale,⁵ but beyond the actual difference,⁶ interest on it cannot be levied.⁷ Where after the sale was knocked down to the decree-holder for Rs. 1,113, and for failure to pay the poundage fee as laid down in the rules of the High Court the property was resold, wherein he himself purchased it for Rs. 700, it was held that section 293 applied and not section 306 and 308 and the difference was caused by the purchaser's default.⁸

1. O.P.C., O. 21, r. 71 (=Old Code, S. 293.)

2. *Gangabattula Kanthamma v. Manchiraju Reddipantulu*, (1924) 46 M L.J. 134=78 I.C. 296.

3. *Kameshwar v. Harbans*, (1919) Pat. 210=50 I. C. 59.

4. *Sita Ram v. Janki Ram*, (1922) 44 All. 266; *Ramendra Nath v. Mt. Hikait Kuer*, (1919) 51 I.C. 316.

5. *Javherbai v Haribai*, (1888) 5 Bom. 575.

6. *Ramdhani v. Rajram*, (1881) 7 Cal. 337; *Vallabhan v. Pangunni*, (1889) 12 Mad. 454; *Rajendra v. Ramcharan*, (1898) 2 C.W.N. 411.

7. *Soorj Buksh v. Sreckishen*, (1869) 9 W.R. 500; *Kameswar v. Harbans*, (1919) Pat. 210=50 I.C. 59.

8. *Madhusudan v. Purnachandra*, (1909) 9 C.L.J. 115=3 I.C. 286.

A person, who bids without informing the Court or its officer conducting the sale that he does so only as the agent of a principal, makes himself personally liable for the deficit caused by auction in not completing the sale by depositing 25 per cent of the purchase-money. The fact that the judgment-debtor knew that the person bidding was only bidding as an agent of a principal is quite immaterial.¹ When a Court acting under the Provincial Insolvency Act resold the property of an insolvent owing to the failure of the auction-purchaser to complete the deposit of purchase-money, and at the re-sale the prices realised fell short of the price for which it was originally knocked down, it was held that the Court had power to call on the defaulting auction-purchaser to pay the amount of the difference and to recover such amount under this rule.²

The fact that the certificate provided for by this rule has not been granted will not prevent the decree-holder and judgment-debtor as the case may be from recovering from the defaulter the deficiency arising on a re-sale. "A careful consideration of section 293 satisfies us that we should not be warranted in drawing the conclusion he asked us to draw from the language contained in it. Two things are provided for by that section. The first is that the deficiency of price and expenses attending the re-sale shall be entered in a certificate to be drawn up by the officer holding the sale. The second is that the deficiency in those expenses shall be recoverable from the defaulter in the manner set out. But each provision is independent of the

Certificate of deficiency.

1. *Gangabattula Kanthamma v. Manchiraju Reddipantulu*, (1924) 46 M.L.J. 134=78 I.C. 296.

2. *Manakchand v. Ibrahim*, (1921) 17 N.L.R. 49=62 I.C. 307.

other, and there is no word or expression compelling us to hold that the first is a condition precedent to the second. It is easy to see that if it were a condition precedent cases of very great hardship and injustice might ensue. The officer holding the re-sale might die before he had granted the certificate, or he might be prevented in other ways from making such a certificate. His incapacity to grant the certificate might be due to no fault of the judgment-creditor or the judgment-debtor. To debar these persons from recovering money to which they are entitled both in law and equity merely because of such an incapacity would amount to a miscarriage of justice."¹

The liability of an auction-purchaser to make good the deficiency of price on a re-sale of the property sold is the creation of a statute relating to procedure and therefore depends on a strict adherence to statutory conditions. Under rule 66, the proclamation of sale shall specify as fairly and accurately as possible the property to be sold. So where the proclamation does not state either fairly or accurately the property to be sold and it is sought to fix the liability for deficiency of price on the first purchaser by reason of the words of the statute the first purchaser can show that the statute has not been complied with and that it cannot be said that there was a resale of the same property as was put up in the first instance.² Similarly under rules 77 and 84, in case of default of payment of the prices the property must be sold forthwith and fresh bids should be invited soon afterwards without the need

1. *Tapesri Lal v. Deokinandan*, (1896) 19 All. 22 (25) on appeal from 14 All. 207.

2. *Gangadas v. Bai Suraj*, (1911) 36 Bom. 329.

for a new proclamation. Where though a period of nearly six months intervened between the default and final sale, the requirements of rule 84 are not fulfilled and the defaulting purchaser will not be liable for a deficiency in the price.¹ Similarly where before a re-sale took place after default, the property was sold under another decree for a lower price than on the first occasion, it was held that there was no re-sale as a matter of fact or law and the defaulting purchaser was not liable for the deficiency.²

The re-sale must be a sale of the same property as was first sold and under the same description and any substantial difference of description at the sale and re-sale in any of the matters required to be specified under section 287, to enable intending purchasers to judge of the value of the property should disentitle the decree-holder to recover the deficiency of price under rule 71.³ Where there fore there is a material misdescription in the proclamation of re-sale,⁴ or where the proclamation of re-sale set out the existing encumbrances, while no such incumbrances were mentioned in the first proclamation;⁵ where in the proclamation of re-sale the property was described as that of B while in the first it was described as that of A,⁶ the deficiency would be attributable to the misdescription and the defaulting purchaser cannot be charged with it.

Resale must be of the same property.

1. *Beliram v. Soden*, (1916) P.W.R. 45=32 I.C. 907.

2. *Bisokhamoyee v. Sonatun*, (1871) 16 W.R. 14, but see *Baboo Suraj v. Sree Kishen*, (1866) 6 W.R. Mis. 126.

3. *Baijnath v. Moheep Naran*, (1889) 16 Cal. 535.

4. *Kali Kishore v. Guru Prasad*, (1889) 25 Cal. 99.

5. *Baijnath v. Moheep Narain*, (1889) 16 Cal. 535.

6. *Gangadas v. Bai Suraj*, (1911) 36 Bom. 329.

*Venkata-
chelumayya
v. Nilakanta.*

In *Venkatachelumayya v. Nilakanta*,¹ Kumara-swami Sastri J. said "The general rule is that it is the property which was sold on the first occasion that must be put up for sale, but this is subject to the property remaining identical. If owing to natural causes or causes attributable to the defaulter, there should be any change either in the property or in the wording of the sale proclamation there is nothing in the Code to release the defaulting purchaser from his liability under rule 71. Time runs and with it follows change. The provisions of Order 21 of the Code of Civil Procedure as to re-sale in case the balance of purchase-money is not paid necessitate a delay of at least one and a half months from the date of the first sale. The reasonable construction to place on rule 71 is that the re-sale should be within a reasonable time after the first sale and property resold should be substantially the same and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default." Accordingly a purchaser in a court-auction of a judgment-debtor's right to get a reconveyance of certain lands on payment of a specified sum is, on default in payment of the balance of purchase-money within fifteen days of the court-sale, liable to pay under summary process under Order 21, rule 71, Civil Procedure Code, any deficiency in price on a re-sale, though the date stipulated for payment to get the reconveyance happens to be shortly after the

1. (1917) 41 Mad. 474 (F.B.)

Court sale and before the expiry of the fifteen days allowed for the payment of the balance.

Where on an immediate resale of property first knocked down for Rs. 200, it fetched only Rs. 50, there was substantial injury to justify a setting aside of the resale though the judgment-debtor could under rule 71 of the Code have received the difference in price from the defaulting purchaser at the first sale.¹ The fact that, without getting the defaulting purchaser of properties at an execution sale to make good the difference in price obtained at a re-sale, other properties of the judgment-debtor were put up and sold, would be no sufficient ground for setting aside the latter sale, where the debtor acquiesced in the cancelment of the re-sale and did not apply under rule 71 to have the difference recovered from the defaulter.²

Setting aside
resale.

In *Kameshwar v. Harbans*,³ the Patna High Court held that the certificate when granted is in effect a decree and said "If a person brings a proceeding under rule 71 and executes a certificate under that rule as a decree, then having exercised his election he deprives himself of the right of subsequently asserting whatever alternative remedy he may or might have at common law. If however the remedy and procedure provided by rule 71 become inoperative and nugatory in effect and infructuous in result owing to an error in procedure, then the judgment-debtor is entitled to pursue the alternative remedy which he has otherwise got under the common law to recover damages for the

1. *Beepin v. Purreshnath*, (1883) 9 Cal. 98.

2. *Gour Chunder v. Chunder Coomar*, (1882) 8 Cal. 291. See *Anandray v. Shekh*, (1878) 2 Bom. 562.

3. (1919) Pat. 120=50 I.C. 58.

wrong that has been done to him at the hands of the defendant, and more especially is this so when the certificate granted under rule 71 has become infructuous mainly by reason of the defendant's conduct." A similar view was taken in Calcutta and Madras.¹ Elsewhere a contrary view has been taken and it has been held that a defaulting purchaser, who has been ordered to make good a deficiency of price resulting from a re-sale, can bring a separate suit to set aside the order.² When the amount sought to be recovered from a defaulting purchaser under this rule is less than Rs. 500, an order passed on the application is not subject to second appeal.³ That is, while according to the former High Courts the order under rule 71 will be appealable as a decree, according the latter it will not be so.

"If property has been sold upon execution, it may, as we have shown, be resold, with the view of proceeding against the purchaser for any deficiency or loss which may result from the re-sale. The sheriff may, however, choose to waive his right to re-sell. If so, he may maintain an action for the full amount of the bid. According to some of the authorities, the cause of action is not complete until the officer has tendered a deed to the purchaser; while others maintain that it is perfect as soon as the bid is accepted, on the ground that an execution sale is never made on credit, and that not until the purchase price is paid is it the duty of the officer to

1. *Sooruj Buksh v. Sree Kishun Doss*, (1863) 9 W.R. 500; *Baiynath v. Moheep Narain*, (1880) 16 Cal. 535; *Kali Kishore v. Guru Prasad*, (1889) 25 Cal. 99; *Amir Baksha v. Venkatachala*, (1895) 18 Mad. 439; *Vallabhan v. Panguuni*, (1889) 12 Mad. 454.

2. *Parbat v. Bindraj*, (1911) 7 N.L.R. 134=12 I.C. 360; *Deoki v. Tapesri*, (1892) 14 All. 201.

3. *Rajacharya v. Chemanna*, (1921) 45 Bom. 223.

execute a deed. If, on the other hand, a re-sale has taken place, an action may be sustained against the purchaser for the deficiency. Whether the action be for the whole purchase price, or for the deficiency resulting from a re-sale, it may, and we think must, be in the name of the sheriff, or other officer conducting the sale; and it can be maintained against no one but the purchaser, although the latter has assigned his bid, or claims to have been acting as agent for another. The judgment-creditor cannot sustain the action, because there is no privity of contract between him and the purchaser. Where the action is brought after a re-sale, a recovery may be had of the difference between the amount realized at the re-sale and the amount bid at the first sale together with the costs of the second sale; but it is said that the jury are not bound by this measure of damages, but may award more or less, as the circumstances of the case may, in their judgment, require. In addition to the costs of the second sale, the purchaser is answerable for any absolutely necessary and proper expenditures attendant upon the keeping and storage of the property pending the re-advertisement and sale thereof. He is entitled to be credited with any sum paid by him at the time of the sale, though the published terms therefore declared that if a bidder does not comply with the sale, he shall forfeit the amount bid and paid. Matters which the purchaser could have urged in opposition to the motion to confirm the sale are, by his failure to urge them, waived, and cannot avail him as defences to an action for the loss resulting from a re-sale. In fact, almost the only defences to such an action are, that the defendant was not the purchaser, or that, through some defect in the judg-

ment or proceedings, the sale was so void when made that it could not divest the title of the judgment-debtor, or that the terms of the sale differed from those of the original sale. A purchaser cannot successfully defend on the ground that he made his bid through some mistake of law or of fact, or that the judgment-creditor owes him, and the amount of this debt should be credited on the bid. Where the purchaser cannot insist upon his rights, he cannot be compelled to complete the sale; for there should be no obligation where there is no corresponding right. The officer conducting the sale has no authority to make any warranty of title. If he should undertake to do so, or should make any false representations, his conduct in this respect might, perhaps, afford the purchaser a cause of action against him; but it would furnish no legal excuse for the non-payment of the bid. Sales under execution always assume to be of all the title and interest of the defendant in the writ. If a sale from any cause is so void that it cannot transfer this title and interest, the purchaser is not bound by his bid, and may successfully resist any action seeking its enforcement. If, however, the defendant had no interest whatever in the property, or an interest of less value than the purchaser supposed, this fact constitutes no defence to an action for the purchase price. Caveat emptor is the rule of execution sales, both at law and in equity. If, upon the re-sale, the property sells for sufficient to satisfy the execution, it has been held that no action can be sustained against the original purchaser for the loss of the re-sale. If this be so, there is an obvious defect in the statute. For while, in such a case, the plaintiff suffers no injury, it is clear that with the defendant it is other-

wise, and his interest ought to be guarded as jealously as those of the plaintiff. In some of the states, a statutory remedy has been given against purchasers at execution sales, whereby, after a re-sale, they may be brought before the Court on motion and a judgment entered against them for the amount of the deficiency."¹

A sale may be set aside by application made under Order 21, rules 89, 90 or 91 or in any of the modes or for any of the causes mentioned in the succeeding Chapter. "Where no application is made under rule 89, 90 or 91 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute."²

Confirmation
of sales.

The word "disallowed" has no reference to an appellate order, but only to the disallowance of the objection by the Court, before which the proceedings to set aside the sale are taken,³ so that irrespective of the pendency of any appeal the Court is bound to, and has no discretion to refuse to, confirm the sale.⁴ Where after a sale in execution of a decree, the decree-holder is paid the amount of his decree and there is a concurrent wish of the parties that the sale should be set aside, the Court may treat the sale as being of no effect and decline to confirm it.⁵ But if there is any irregularity in publishing

1. Freeman on EXECUTIONS, II. 1839.

2. C.P.C., O. 21, r. 92 (1) (=Old Code, S. 312). The old section ran thus: "If no such application as is mentioned in the last preceding section (311) be made or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser."

3. *Mahomed Hossein v. Purundr*, (1885) 11 Cal. 287 (292).

4. *Umesh Chunder v. Shib Narain*, (1904) 31 Cal. 1011.

5. *Ram Prasad v. Ram Charan Singh*, (1915) 27 I.C. 601.

or conducting the sale, the auction-purchaser has no absolute right to have the sale confirmed though the irregularity be not his.¹

“ There may be irregularities in the sale not sufficient to avoid it if confirmed, and of which the only parties who could be prejudiced thereby do not complain. May the purchaser urge these to obtain a release from his bid ? There is a dictum to the effect that, because the purchaser could not obtain confirmation in such a case against the objection of a party to the suit, he will not be compelled to perfect his purchase ; or, in other words, that the right of confirmation must be mutual. But we think the more sensible rule is, that if the proceedings are such that the purchaser can acquire title, he will not be heard to urge irregularities which, manifestly, either had no effect whatever upon the sale, or operated to his advantage. The following irregularities have been adjudged sufficient to justify a denial of confirmation of the sale. Want of proper notice of the sale ; selling distinct tracts *en masse* ; selling in defiance of a stay of proceedings. A sale may be refused confirmation because not in the mode prescribed in the decree, or even because the report fails to show whether it was so made or not. A sale may, nevertheless, be confirmed, though, in making it, the officer departed from the directions of the decree, for the Court may ratify his action, if it had power to have directed him in the first instance, to proceed in the mode which he in fact pursued.”²

“ The confirmation of a sale may be resisted,

1. *Raja of Kalahasti v. Maharajah of Venkatagiri*, (1915) 38 Mad. 387.

2. *Freeman on Executions*, II. 1755.

or a motion to vacate a sale be made, by the purchaser as well as by one of the parties to the suit, and on the same grounds. That a purchaser may resist the confirmation of a sale for irregularity in the proceedings operating to his detriment, or for any fraud or misconduct of the parties, there can, we apprehend, be no question. Where, however, he urges merely that to hold him to his bid would be unconscionable, there is more occasion for dissent, and therefore more conflict of decisions. The English rule upon the subject is thus stated by Mr. Daniell: Where the contract is unreasonable, the court will relieve the purchaser, as well as the seller. Thus, in *Savile v. Sale*, 1 P. Wms, 745, a purchaser, about the time of the South Sea Bubble, was discharged on submitting to forfeit his deposit on the ground of the exorbitance of the price. With respect to the last case, however, it is to be observed that there is no doubt now that the circumstance that the price given is much beyond the value of the estate will not be, of itself, a sufficient ground to release a purchaser from his contract, even upon the terms of forfeiting a deposit. Where, however, a purchaser has, by mistake, given an unreasonable price for an estate, the court will, in a proper case, wholly rescind the contract."¹

“Objections to the confirmation of chancery sales may be regarded as falling under some one of the following classes: 1. Those in which the objection is that the proceedings have been irregular in some substantial particular; 2. Those in which some fraud, trick, or device, or other misconduct has operated to the prejudice of the party objecting; 3. Those in which the complaining party has

1. Freeman on Executions, 11. 1771. See *Ravi Nandan v. Jagarnath*, (1925) A.L.J. 233.

suffered through some surprise, misapprehension, or accident, which, though not due to the misconduct of his adversary, may yet entitle him to relief; and, 4. Those in which the contract of sale is so inequitable and unconscionable that the Court will decline to enforce it. In cases of the latter class, the claim for relief is very frequently enforced by objections falling within one or all of the preceding classes."¹

No order confirming a sale in execution should be made under this rule, until 30 days had elapsed within which an application to set it aside could be made.² The Court must be satisfied not only that the sale was good but that there was before it a subsisting decree in the execution of which it ought to proceed by granting confirmation. When therefore the decree has been reversed on appeal, no confirmation can be granted after such reversal.³ Where a sale in execution is held prior to the admission of satisfaction of the decree by the decree-holder, the sale cannot be confirmed after satisfaction is notified to the Court.⁴ A sale in execution of a decree, which has been set aside as against one of the several defendants, cannot be confirmed in its entirety but only against the shares of the other defendants.⁵

Where the precipitate action of the Court had led to the confirmation of sale before the time

1. Freeman on EXECUTIONS, II. 1753.

2. *Atar Singh v. Lajpat Bai*, P.R. 19 of 1884.

3. *Mulchand v. Mukta Prasad*, (1887) 10 All. 83; *Basappa v. Dundya*, (1878) 2 Bom. 540; See also *Potu Begum v. Indurjeet*, (1868) 12 W.R. 201; *Mahomed Hossein v. Kokil Singh*, (1881) 7 Cal. 91; *Doyamoyi Dasi v. Sarat Chunder*, (1897) 25 Cal. 175; *Ram Sukh v. Ram Sahai*, (1907) 29 All. 591.

4. *Nilkanth v. Yeshwant* (1922) 18 N.L.R. 134=65 I.C. 531.

5. *Hari Ram v. Gopi Kishan*, (1921) 61 I.C. 571.

allowed for objections has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court will interfere. When the first application on behalf of a minor to set aside a sale under rule 90 was rejected, and the sale was confirmed, and a second application was again made, which was also rejected on the ground that the Court could not entertain any such objection after confirmation, it was held that having regard to Section 7 of the Limitation Act, the second application was not barred and the judgment-debtor had every right to make it and the Court should have dealt with it before proceeding to confirm the sale.¹ Where owing to an order for postponement of an execution sale not being communicated in time to the officer conducting it, such sale is effected and is confirmed by the Court, such Court does not act improperly or *ultra vires* in reviewing the order of confirmation and setting aside the sale as illegal, for the order for sale having been withdrawn the sale was made without authority.²

Order 21, rule 92 does not oust the inherent power of a Court to interfere to cancel the sale even though no party has applied for cancellation when the Court discovers in the course of the proceedings, that the decree holder auction-purchaser deliberately misled it and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors.³

An appeal lies against an order setting aside a sale or refusing to set aside a sale.⁴ Except Appeal.

1. *Baldeo Singh v. Kishon Lal*, (1887) 9 All. 411.

2. *Mian Jan v. Man Singh*, (1880) 2 All. 686; *Ramji Das v. Lala Chagal Lal*, (1932) All. 282=69 I. C. 745.

3. *Raghavachariar v. Murugesu Mudali*, (1923) 46 Mad. 583.

4. C.P.C., O. 43, r. 1 (j).

when the order falls within section 47,¹ no second appeal lies from the appellate order,² though the Court professes to act under section 47.³ If the sale is set aside the auction-purchaser can appeal against the order,⁴ even when the decree was of a Small Cause Court if it has been transferred to the original side for execution.⁵

An appeal against an order confirming a sale, to which the auction-purchasers were not made parties till long after the appeal was time-barred as against them, should be dismissed.⁶

1. *Kokil Singh v. Edal Singh*, (1904) 31 Cal. 385; *Doyamoyi Dasi v. Sarat Chander*, (1897) 25 Cal. 175.

2. C. P. C., S. 104 (2); *Narayan v. Rasul Khan*, (1892) 23 Bom. 53; *Nana Kumar v. Golam Chunder*, (1891) 18 Cal. 422; *Gopi Koeri v. Gopal Lal*, (1894) 21 Cal. 799; *Aubhoya Dossi v. Pudmo Lochan*, (1895) 22 Cal. 802; *Luchmipat v. Mandil Koer*, (1898) 3 C. W. N. 333; *Mathuranath v. Nobin Chandra*, (1897) 24 Cal. 774; *Kuar Radhika Raman v. Gulzar Kuar*, (1912) 13 I.C. 147; *Mahabir Sahu v. Bhirgu Rai*, (1915) 13 A.L.J. 351=28 I.C. 270; *Rakhal Chandra v. Manaranjan Das*, (1917) 41 I. C. 753; *Tungnath v. Kanhaiyalal*, (1917) 4 O.L.J. 372=41 I.C. 121; *Jagannath v. Daud*, (1922) 4 Lah. 243; *Asanund v. Jhangiram*, (1919) P.L.R. 29=50 I.C. 610; *Jiwan Singh v. Sawan Mal*, (1919) P.R. 168=54 I.C. 941; *Jagannath v. Pir Mohammad*, (1923) Lah. 287=72 I.C. 788; *Jagmohan v. Baccha*, (1922) 25 O.C. 78=66 I. C. 929. See also *Kali Kanta v. Shyam Lal*, (1917) 25 C.L.J. 163=38 I.C. 598; *Girindra v. Nandlal*, (1918) 38 I.C. 63. See CONTRA, *Sujaud-din v. Reajuddin*, (1899) 27 Cal. 414; *Jung Bahadur v. Mahadeo Prasad*, (1903) 31 Cal. 207; *Raja v. Srinivasa*, (1888) 11 Mad. 319; *Ningappa v. Gangawa*, (1886) 10 Bom. 433; *Musammatt Sobaran Kuar v. Ude Sah*, (1907) 10 O.C. 353.

3. *Maula Bux v. Raghubar*, (1918) 3 Pat. L.J. 645=48 I. C. 560; See also *Uma Kanta Roy v. Dinonath*, (1900) 28 Cal. 4; *Bansidhar v. Gulab Kuar*, (1894) 16 All. 443.

4. *Gopal Singh v. Dular*, (1879) 2 All. 352; *Kanthi Ram v. Banki Lal*, (1879) 2 All. 396; *Fazal Rab v. Manzar Ahmed*, (1918) 40 All. 425; *Bibi Sharofan v. Mahomad*, (1911) 15 C.W.N. 685=10 I.C. 148.

5. *Kandasami Asari v. Swaminatha*, (1920) M.W.N. 151=53 I.C. 958.

6. *Khaira v. Salem Rao*, (1920) 1 Lah. 21.

An auction-purchaser not being a party cannot appeal from an order confirming the sale in favour of a co-sharer,¹ and a co-sharer not being a person mentioned in rule 90 cannot appeal objecting to the confirmation of sale in favour of auction-purchaser and ask confirmation for himself.²

No appeal lies against the order of a single Judge of the High Court.³ If the Court wrongfully exercises or refuses to exercise its jurisdiction, the High Court may revise the order.⁴ In the case of orders of the Collector under Schedule III no suit lies, but an appeal lies to the Commissioner.⁵

“No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.” This provision of the new Code is a considerable expansion of the provision of the Code of 1882. Under that Code, “No suit to set aside on the ground of such irregularity an order passed under this section shall be brought by the party against whom such order has been made.”⁶

Bar of suit
against orders
under rule 92.

Whereas this old section applied only to an order passed on the ground of irregularity under section 311, (now rule 90),⁷ this rule prohibits a suit to set aside an order confirming the sale or setting aside the sale on an application made under

-
1. *Muniruddin v. Abdul Rahim*, (1881) 3 All. 674.
 2. *Bisheshur v. Hari Singh*, (1882) 5 All. 42.
 3. *Bansidhar v. Gulab Kuar*, (1893) 15 All. 443.
 4. *Sookoomar v. Kashee*, (1870) 13 W. R. 250; *Lakshmana v. Najimuddin*, (1884) 9 Mad. 145; *Chakrapani v. Dhanji*, (1900) 24 Mad. 311; *Birj Mohun v. Rai Umanath*, (1892) 20 Cal. 8; *Ishvar Lakshmidat v. Harjivan Ramji*, (1886) 21 Bom. 681; *Santosh Bala Debi v. Ramchandra*, (1922) 67 I.C. 286.
 5. *Nazir Hussain v. Kanhya Lal*, (1916) 35 I.C. 473.
 6. C.P.C., O. 21, r. 92 (3).
 7. S. 312.

rules 89, 90 or 91 or where no such application is made at all,¹ and the prohibition applies to any person against whom an order is made. So when the order has been passed not on any of the grounds mentioned in rules 89, 90 or 91, but on the ground that a re-sale would be advantageous to all the parties, the prohibition will not apply.² Where it was sought to set aside a sale on the ground of a prior execution sale of the same property having been set aside (which took place after the confirmation of the second sale), the suit was maintainable because the ground of action was not fraud or anything connected with the sale itself and no proceedings in execution were pending in which it was possible for the plaintiff to raise the question under section 47, C.P. Code.³

In *Mathuradas v. Panhalall*,⁴ the execution of a decree was transferred to the Collector by the civil Court and the Collector set aside a sale on the ground that the judgment-debtor had made full payment of the sum decreed. The purchaser instituted a suit for confirmation of the purchase and the suit was upheld, because it was said that Sections 311 and 312 must be read together and when so read the last clause of Section 312 did not bar the suit. The principle of this decision still holds good,

1. See *Alimuddin v. Naubat Rai*, (1883) A.W.N. 264; *Madan Mohan v. Baroda Sundari*, (1881) 8 C.L.R. 261.

2. *Amrit v. Gunda*, (1869) 1 N.W.P. 183; *Jummal Ali v. Tirbhee Lall*, (1868) 12 W.R. 41; *Annamalai Chetty v. Muthulinga Pillai*, (1871) 6 M.H.C.R. 360; *Daulat Bibi v. Qutub Husain*, (1881) A.W.N. 35; *Banno Bibi v. Jasoda Kuar*, (1888) A.W.N. 248. See also *Bhim Singh v. Sarwan Singh*, (1888) 16 Cal. 33; *Gajrajmati v. Akbar Husain*, (1906) 29 All. 196 P.C.

3. *Prangour Mozoomdar v. Himanta Kumari*, (1886) 12 Cal. 597.

4. (1894) 19 Bom. 216.

but the actual decision is obsolete under this Code, because while the present rule 92, covers applications under 89, the corresponding old section (312) did not apply to applications under the old section 310A. In *Sangam Ram v. Sheobart Bhayat*,¹ where the same property was sold on the same day to two persons in execution of two different decrees, and the sale to one of them was, at the instance of the other, set aside on the ground that the decree of the former had been satisfied prior to the sale, a separate suit to set aside the order of the Court was maintainable, because the order was not one passed under this section, but the suit must be for a declaration that the sale to him must be confirmed but not for possession as the remedy for possession must be sought in the Court of execution. In a suit by the auction-purchaser which was dismissed on an equitable ground, such as laches, the question of its maintainability was not raised.²

A civil Court can entertain a suit for a declaration that an order made by a Collector, to whom a decree has been sent for execution, setting aside a sale held in such execution is inoperative.³ The mere fact that the Collector exercises the powers which the civil Court could have exercised but for the provisions of Sch. III C. P. Code and the rules framed under it cannot deprive the civil Courts of their ordinary jurisdiction to entertain such suit,⁴ if such a suit is not prohibited by this rule.⁵ In

1. (1880) 3 All. 112. It was under S. 257 of Code of 1859 which corresponded to this rule.

2. *Ram Dial v. Mahtab Singh*, (1881) 3 All. 701.

3. *Mathura Das v. Janma Prasad*, (1903) 25 All. 355.

4. *Shiam Behari v. Rup Kishore*, (1898) 20 All. 379 F.B.; *Bandi Bibi v. Kalka*, (1887) 9 All. 602; *Hardeo v. Narbadi*, (1909) 5 N.L.R. 121=3 I.C. 572.

5. See *Manak Chand v. Sunder Lall*, (1897) 11 C.P.L.R. 33. See *Bhagwan Das v. Suraj Prasad*, (1924) 47 All. 217.

execution-proceedings held before a Collector, when once an application is made, within the time limited by law to the Collector to set aside the sale, the Collector is bound to refer the application to the civil Court. If the Collector, notwithstanding the reference of the application to the civil Court, proceeds to confirm the sale, the judgment-debtor can sue to have the sale declared void when the auction-purchaser is not the decree-holder.¹

The restriction of suits made by this rule will operate only in cases where a Court acts wrongly within its jurisdiction and not to cases where a Court has gone wholly out of its jurisdiction.² In *Sukhai v. Daryai*,³ a sale was set aside on the sole ground that the price realised was low and there was no allegation of irregularity in the application. It was held that the Court had failed to do the duty imposed on it by law of confirming the sale and exceeded its jurisdiction by cancelling the sale and a suit would lie to cancel that order.

This rule (92) does not apply to sales under Bengal Act VII of 1880,⁴ or to proceedings under the Public Demands Recovery Act (Bengal Act I of 1895),⁵ so that a suit to set aside a sale under those Acts is maintainable in a civil Court. No suit

1. *Balgauda v. Mallappa*, (1920) 44 Bom. 551.

2. *Unnosol Chunder v. Hurry Nath*, (1876) 2 C.L.R. 339; *Kooldip Singh v. Juggurnath Singh*, (1856) 2 W.R. Mis. 19.

3. (1877) 1 All. 374; *Diwan Singh v. Bharat Singh*, (1880) 3 All. 206 (210) F.B. See also *Shiam Behari v. Rup Kishore*, (1898) 20 All. 379.

4. *Sadhusaram v. Panchdeo*, (1887) 14 Cal. 1; *Ramlagan v. Bhawani*, (1887) 14 Cal. 9.

5. *Ram Taruck v. Dilwar Ali*, (1902) 29 Cal. 73; *Girish Chunder v. Golam Karim*, (1906) 33 Cal. 451. But see *Hari Charan v. Chandra Kumar*, (1907) 34 Cal. 787.

lies to set aside a sale made under section 174 of the Bengal Tenancy Act (VIII of 1885).¹

To this rule of prohibition of suits must be added the provisions of section 47 C. P. Code. If the person aggrieved is a party in the cause, his remedy is by an application in execution and not by a regular suit,² unless he was made a party to the suit in a different capacity.³ In *Bhan Singh v. Prithami Chand*,⁴ the plaintiffs who applied in execution of a decree against their predecessor-in-title for setting aside a sale under Order 21 rule 89 were not parties to the decree or proceedings in execution and a suit by them was held not barred under rule 92.

No sale of immovable property in execution becomes absolute until it is confirmed.⁵ An order of confirmation is more than a mere ministerial act and is a judicial determination between the purchaser and the judgment-debtor that none of the objections on which the latter could have sought to set

Effect of
confirmation.

1. *Kabilaso Koer v. Raghunath*, (1891) 18 Cal. 481 ; *Pahlad v. Sajivan*, (1921) 6 Pat. L.J. 16 = 61 I.C. 126.

2. See Vol. I, 214. *Modun Mahun v. Baroda Soondari*, (1882) 8 C.L.R. 261 ; *Mohendro Narain v. Gopal*, (1890) 17 Cal. 769 ; *Dungaram v. Rajakishore Deo*, (1890) 18 Cal. 133 ; *Jagannath v. Watson & Co.*, (1892) 19 Cal. 341 ; *Prosunno Kumar v. Kalidas*, (1892) 19 Cal. 683 ; *Sorabji v. Kala Raghunath*, (1912) 36 Bom. 156 ; see further Chapter on ANNULMENT OF SALES *post*. See also *Prangour v. Himanta*, (1886) 12 Cal. 597.

3. See *Kali Mohun v. Anandamoni*, (1883) 9 C.L.R. 18 ; *Collector of Monghyr v. Hurdai Narain*, (1879) 5 Cal. 435.

4. (1916) P.L.R. 104 = 36 I.C. 212.

5. *Mahomed Hossein v. Purundur*, (1885) 11 Cal. 287 (292) ; *Birji Mohun v. Rai Uma Nath*, (1892) 20 Cal. 8 P.C. ; *Shirin Begam v. Agha Ali*, (1895) 18 All. 141 (145) ; *Khetta Nath v. Faizuddin*, (1897) 24 Cal. 682 (685) ; *Girdharilal v. Bhago*, 92 P.R. 1907 ; *Sawan Mal v. Shib Dayal*, (1915) P. R. 81 = 31 I.C. 254 ; *Arunagiri v. Uthando*, (1912) M.W.N. 1136 = 17 I.C. 242 (and not when a petition under O. 21, r. 90 is dismissed).

aside the sale before confirmation, exists in the particular case.¹

“ When the law under which a sale is made requires it to be reported to court for approval or disapproval, such approval is essential to the confirmation of the sale. Without it there is no authority for making any conveyance to the purchaser, and a conveyance without authority is obviously void. This rule is equally applicable to execution, chancery and probate sales. But instances may occur in which the ratification or acquiescence of the parties may either estop them from invoking this rule or give rise to the presumption that an order of confirmation was made, of which the evidence has been lost. So, the approval of the court has sometimes been inferred from its subsequent acts and proceedings, though no order of confirmation could be found in its record. The failure of the clerk of the court to enter the decree of confirmation on the minutes of the court is not fatal to the purchaser's title, where it sufficiently appears that such decree was in fact ordered by the court. In the absence of any statute to the contrary, it is not material in what form the approval of the sale is expressed. The whole record of the court will be examined, and if from anything therein it is apparent that a sale was approved, this is sufficient. Hence, the confirmation of a sale is inferable from an entry approving the accounts of an executor or administrator, if therein he has charged himself with the proceeds of the sale. Surely it is the better practice to have a formal order of confirmation entered and to set forth therein the acts done by the officer, so that an inspection of the

1. *Narayana v. Kalyana Sundara*, (1895) 19 Mad. 219 (228).
See also *Mulchand v. Mukta Prasad*, (1887) 10 All. 83.

order will of itself show that the court has found the giving of the proper notice and the doing of such other acts as were essential to the sale, and further, what were the terms of the sale, the price realized, the property sold, and the person to whom the sale was made ; but, unless some statute so directs, it is not necessary that all or any of these facts appear by the order of confirmation itself, for the order of sale, the report of the executor or administrator, and all of the papers on file, as well as the minutes of the court, may be examined, and if, when taken in connection with the sale and the order of approval, these facts sufficiently appear, the sale cannot be held invalid for want of proper confirmation.¹

“ In Kansas, the confirmation by the Court of an execution sale is an adjudication merely that the proceedings of the officer, as they appear on record, are regular, and a direction to the sheriff to complete the sale. With respect to chancery and probate sales, we apprehend that there confirmation has an effect beyond that conceded in Kansas to the confirmation of execution sales. The objection of the proceeding for confirmation is to furnish an opportunity for inquiry respecting the acts which have been done under the licence to sell, and to obtain the decision of the Court, whether, under all the existing circumstances, the sale should be set aside or approved. If the Court has jurisdiction to prosecute this inquiry and to make this decision, its approval must, upon principle, be received as an adjudication that such acts have taken place as were necessary to justify the sale, that it has been made as reported, or as disclosed by the order of confirm-

1. Freeman on VOID JUDICIAL SALES, 140-1.

ation, and that as made it should be and is approved. When afterwards some attempt is collaterally made to avoid the sale, and involves an inquiry which should have been pursued by the Court before directing the confirmation, such inquiry may fairly be regarded as no longer open, for the reason that the matter has already been adjudicated. As to the matters upon which a Court is required to adjudicate in its order of confirmation, we see no reason why its decision should not be binding and should not preclude the reassertion of any matter which was either passed upon by the Court, or which the parties might have had passed upon if they had chosen to bring it to the attention of the Court. Hence, after the confirmation, the purchaser's liability is established, and he can no longer assert, while the order of confirmation remains unvacated, that the sale was not made, nor that it included property different from that shown by the report or confirmation, nor that the title was defective, nor that reasons existed for releasing him from his bid, nor any other matter inconsistent with the order of confirmation.

“ The only question strictly material here is, to what extent does the confirmation of the sale protect the purchaser from the claim that the sale is void. In the first place, if there is an alleged failure to comply with some direction of the decree or of the law with which the Court had power to dispense before the sale, it may generally dispense with it afterwards, and the confirmation is equivalent to a dispensing with such direction or condition, as where the officer did not sell the property upon the terms required by the decree or order of sale, in which case its confirmation must be accepted as an

approval of the different terms imposed or accepted by the officer and disclosed to the Court by his report of the sale, or otherwise.

“ The chief value of the order of confirmation to the purchaser is to protect him from the claim that some supposed condition precedent to the sale has not been complied with and hence that the sale cannot be sustained. The order of confirmation is equivalent to an adjudication either that such condition precedent did in fact exist, or, where the Court had power to dispense with it, that the Court regarded the sale as one proper to be approved, notwithstanding the omission of such condition. In the first place, in the absence of evidence to the contrary, the order of confirmation undoubtedly creates a presumption of the regularity of the original proceedings, and it cannot be successfully insisted that a sale was void because the record or other evidence fails to show the existence of some fact which ought to have preceded the sale. It will, therefore, be presumed in support of an order of confirmation that there was proof of the posting of the notices of the sale, or that the administrator gave the bond necessary to authorize him to make the sale, or that a citation has been issued and served as the law directs on the filing of an application for a guardian's sale, and prior to the entry of the order of sale. After a sale has been confirmed, it cannot be defeated by showing collaterally that there was a failure to appraise the property, or a defect in the notices of sale, or that the administrator did not exact security for the payment of the purchase-money, or that the commissioner who made the sale was not authorized to make it, or that the officer departed from the order of sale prescribed by

the decree, or that the summons served on the heirs was returnable in ten days instead of twenty, or that there was no notice of the application for the confirmation of the sale, and that an appointment of a guardian *ad litem* was made without inquiry respecting his fitness, or that the sale was for cash when the law required it to be upon credit, or that the sale was improperly adjourned from the Court house, where it was advertised to take place, to another place in the country near the land in question, or that the letters of administration were void because they did not bear upon their face the impress of the seal of the court. If the order of sale incorrectly describes the land intended to be sold, but contains some elements of description which, if pursued, may show the land to which the order was intended to apply, and it is correctly described in the order of confirmation, this may, perhaps, cure the infirmity of the order. The Court in this case said: "We are strongly inclined to the opinion that where such a sale has been brought in question in a collateral manner the decree of confirmation should protect the purchaser, and be preclusive of all questions save that of the jurisdiction of the Court over the estate, which, as we have seen, the Court had in this instance. It is possible for a sale to be reported and confirmed without any previous order having been made, and the interested parties be content with the transaction; and it would seem a vicious principle that would admit of their allowing the sale to be perfected when, by an appeal, they could have it avoided, and afterwards avail themselves of the defect in a collateral suit for the property against, as in this case, remote purchasers." The Code of Civil Procedure of California declares,

with respect to probate sales, that "all sales must be under oath, reported to and confirmed by the Court, before the title to the property sold passes." In an action of ejectment, it appeared that defendant's title was based on a probate sale; that the return of sales, as offered and received in evidence, was not verified, but that the order of confirmation contained a recital, "that the return of sale was duly verified by affidavit." The Court said: "That this recital is conclusive in the present case, and a finding of fact to the contrary does not in any manner affect the conclusiveness of the recital in the decree. The fact was not a jurisdictional one and the principle applicable to the inconclusiveness of statements, or recitals in judgments, conferring jurisdiction, does not apply."

"The curative powers of orders of confirmation extend to voidable, rather than to void sales. If a sale is void because the Court did not have jurisdiction to order it, or because it included property not described in the decree or order of sale, an order confirming it is necessarily inoperative. "The sale being void, there was no subject-matter upon which the order of confirmation could act. If the Court had no jurisdiction to order the sale, it had none to confirm it. Where there is no power to render a judgment, or to make an order, there can be none to confirm or execute it." Thus where an order of sale is necessary, its absence cannot be supplied by an order confirming the sale. If there was no pre-existing order of sale, or if, though such order was entered, the Court did not have jurisdiction to enter it because of the failure to give notice of the application thereof, or for any other reason, the Court not having jurisdiction to order the sale

is equally without jurisdiction to confirm a sale made under its void order. If, after property is sold at probate sale to the highest bidder, he fails to comply with his bid, and another person is substituted in his place, and is reported to the Court as the purchaser, and the sale is confirmed to the latter, he cannot avoid the sale and be exonerated from paying the purchase price. "The mere substitution of one person for another cannot affect the validity of the sale. The order directing the sale, and the order confirming it, give vitality to purchase."

"The irregularities which are cured by the entry of a decree or order of confirmation relate chiefly, if not exclusively, to the proceedings of the Court and its officers or of the person conducting the sale. The sale may have been attended by wrongful acts or devices of the purchaser, or by the positive fraud either of himself or of others, of which he had notice, actual or presumed. Questions involving these frauds are not ordinarily presented for consideration at the time the sale comes on for approval or disapproval. Their existence is generally not discovered until a later date. When they are not suggested to the Court by the return of sale, or by some other means, they remain open, notwithstanding the decree of confirmation. The better opinion, however, in our judgment is, that such sales are not absolutely void in the sense that they are subject to collateral attack. Relief may sometimes be had by an application to the Court for an order vacating the order of confirmation and setting aside the sale, or by an independent suit in equity, relying upon fraud,

surprise or other sufficient ground for equitable interposition.

“As the purchaser's title is dependent upon the order of confirmation, whatsoever destroys that order destroys his title. Usually, if after a sale under a judgment or decree to a third person it is reversed, the reversal does not impair his title. The rule is necessarily different where it is the order confirming the sale which is reversed. The purchaser though not ordinarily a party to the suit, it necessarily affects him by removing, as it does, an indispensable link in his chain of title.”¹

Where monies were realised by the sale in execution of the judgment-debtor's properties and the decree-holder was not allowed to draw out his amount owing to the delay in the confirmation of sale resulting from disputes between bidders at the execution-sale, the decree-holder is entitled to interest on his decree-amount up to the date of confirmation of the sale.²

“Where a sale of immoveable property has become absolute the Court shall grant a certificate specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser. Such certificate shall bear the date the day on which the sale became absolute.”³ The rule is mandatory and if the purchaser is entitled to it, the Court has no power to refuse it.⁴

Certificate of sale.

There is no limit of time for applying for the

1. Freeman on VOID JUDICIAL SALES, 143-8.

2. *Nafar Chandar Pal v. Gopal Chandra*, (1914) 19 C.L.J. 358=22 I.C. 946.

3. C.P.C., O. 21, r. 94 (=Old Code, S. 316).

4. *Baikunti Misser v. Narindra Sundari*, (1917) 1 Pat. L.J. 446=38 I.C. 576.

sale certificate.¹ The application need not be in writing and if in writing it requires no court-fee.² If the purchaser is dead the certificate may be granted to his legal representative.³ But the certificate cannot be granted to the purchaser jointly with another to whom he has agreed to sell a part of the property after the purchase.⁴ When the original sale certificate was not registered, the High Court directed a grant of a fresh certificate dated the day on which it might be granted.⁵

Amendment
of certificate.

The Court has inherent jurisdiction to amend an erroneous description in the sale certificate,⁶ but cannot do that so as to show the purchase of a larger share of the property than what was stated in the sale proclamation.⁷ If a Court amends a sale certificate without notice to the judgment-debtor or other persons interested in it, it acts with material irregularity and the order is subject to revision;⁸ a sale certificate cannot be amended without notice to the party interested.⁹ There is no appeal against the order granting or refusing amendment, as it is not a matter relating to the execution of the decree.¹⁰

1. *Kylasa Goundan v. Ramasami*, (1882) 4 Mad. 172; *Vithal Janardan v. Vithojirao*, (1882) 6 Bom. 586; *Saligram v. Narain Das*, (1910) 5 I.C. 263; also *Devidas v. Pirjada*, (1884) 8 Bom. 377.

2. *Hira v. Tek Chand*, (1889) 13 Bom. 670.

3. *In re Vinayak Narayan*, (1900) 24 Bom. 120.

4. *Baburam v. Dakhina Sundari*, (1920) 24 C.W.N. 27 = 54 I.C. 726.

5. *In re Lakshman*, (1885) 9 Bom. 472. See also *Nandram v. Kacha Bhavy*, (1885) 9 Bom. 526.

6. *Nasiuddin v. Sayadur Rahman*, (1914) 19 C.L.J. 209 = 2 I.C. 811; *Mackenzie v. Ram Peary*, (1913) 20 I.C. 588; *Nandi Lal v. Jogendra*, (1924) 39 C.L.J. 222 = 82 I.C. 297.

7. *Nazir Ahshan v. Dalip Mahton*, (1913) 18 I.C. 725

8. *Yagnaswami v. Chidambaranatha*, (1923) M.W.N. 130 = 65 I.C. 732.

9. *Rajah Raghoonundan v. Wilson*, (1875) 23 W.R. 301.

10. *Boojha Roy v. Ram Kumar*, (1899) 26 Cal. 529; *Bhimaldas*

The Indian Stamp Act¹ prescribes the stamp- Stamp.
duty leviable on a certificate of sale :—

“ Art. 18. CERTIFICATE OF SALE (in respect of each property put up as a separate lot and sold) granted to the purchaser of any property sold by public auction by a Civil or Revenue Court or Collector or other Revenue officer.

- (a) When the purchase money does not exceed Rs. 10/- ... Two annas.
- (b) Do. Do.—exceeds Rs. 10/- but does not exceed Rs. 25/- ... Four annas.
- (c) in any other case the same duty as a CONVEYANCE² for a consideration equal to the amount of the purchase money only.

v. Ganesha Koer, (1897) 1 C.W.N. 658; *Jagarnath v. Kartick*, (1900) 7 C.L.J. 436; *Saddo Kunwar v. Bansidhar*, (1901) 23 All. 476; *Mammol v. Locke*, (1897) 20 Mad. 487.

1. Act II of 1899. But note that this Act has been amended by the various Local Legislatures.

2. Art. 23 : Conveyance as defined by section 2 (10) not being a transfer charged or exempted under No. 62.

Where the amount or value of the consideration for such conveyance as set forth therein does not exceed Rs. 50/- Eight annas

Where it exceeds Rs. 50/- but does not exceed

		Rs. 100	One rupee
Do.	100	Rs. 200	Two rupees
Do.	200	300	Three rupees
Do.	300	400	Four rupees
Do.	400	500	Five rupees
Do.	500	600	Six rupees
Do.	600	700	Seven rupees
Do.	700	800	Eight rupees
Do.	800	900	Nine rupees
Do.	900	1,000	Ten rupees
and for every Rs. 500/- or part thereof in excess of Rs. 1,000			Five rupees

In respect of this provision, the Mover of the Bill said "The fourth amendment refers to the stamp which is required on a certificate of sale given by a Civil or Revenue court or Collector or other Revenue Officer. A single property is at such a sale sometimes put up in separate lots. The consequence is that the words inserted by the Select Committee for the purpose of defining the stamp duty required namely in respect of each property sold, are not quite clear. What the Select Committee intended was that they would regard each property separately put up a subject of duty and that the duty required should be levied in respect of each property put up as a separate lot and sold. The insertion of these words italicised will make the definition intended by the Select Committee clearer."

It appears therefore that apart from the question whether the purchaser of the several lots be the same person or not or whether the several lots are contiguous or not, the stamp duty is leviable on every item sold as a separate lot, though when the purchaser is the same, there can be no objection for the same certificate embracing the several lots purchased.

Under section 35 of Indian Stamp Act (II of 1899) a sale certificate cannot be registered unless it is properly stamped. Under the General Stamp Act of 1869, certificates of sale issued by Revenue or Civil Courts were not liable for stamp duty. But under the provisions of section 259 of C. P. Code certificates of sale were understood as conveyances and as such had to be stamped.¹ Act I of 1879 imposed the duty on all certificates of sale. Till the year 1894, Courts were not agreed as to the amount

1. *Reference*, (1875) 4 M.H.C.R. 162.

chargeable in respect of sales of land subject to encumbrances. The Bombay High Court held that the principal amount of the mortgage debt, subject to which the property was sold along with the actual purchase money,¹ while in the other High Courts the purchase, irrespective of the encumbrance was the measure of consideration. The amending Act of 1884 set this conflict at rest, by saying "the purchase money only" in favour of the latter view.²

The stamp-duty is payable by the purchaser,³ and that not by the deposit of money but by production of the stamp-paper only.⁴

A certificate of sale issued under the Civil Registration. Procedure Code is not an instrument operating to create, limit or extinguish title. It is an act of Court exhibiting its assent to the sale which in effect transferred what title the owner had to the purchaser, such transfer to take effect on the granting of the certificate.⁵ Under the Registration Act of 1877 and earlier, sale certificates for value above Rs. 100

1. *Sha Nagindas v. Halalkore*, (1881) 5 Bom. 470 ; *In re Rama Krishna*, (1885) 9 Bom. 47 ; *In re Vishnu*, (1885) 10 Bom. 58 ; *Mur Kisur v. Ebrahim*, (1890) 15 Bom. 532 ; *Shantappa v. Subrao*, (1893) 18 Bom. 175.

2. *Reference*, (1882) 5 Mad. 18 ; *Reference* (1884) 7 Mad. 421 ; *Reference* (1883) 10 Cal. 92 ; *Jwala Prasad v. Ram Narain*, (1889) 15 All. 107.

3. Indian Stamp Act (II of 1899), s. 10.

4. *Hira v. Teckchand*, (1889) 13 Bom. 670.

5. *Narasayya v. Jungam*, (1883) 7 Mad. 418 ; *Husain v. Mulo*, (1882) 5 All. 84 ; *Masarut-un-unissa v. Adit Ram*, (1883) 5 All. 568 F.B.; *Prokash Chander v. Tarachund*, (1882) 9 Cal. 82 F. B.; *Srinivasa v. Sessa*, (1881) 3 Mad. 37 , *Ramanja v. Arunachala*, (1883) 7 Mad. 248 ; *Shivram v. Ravji*, (1883) 7 Bom. 254 ; *Lakshman, applicant* (1885) 9 Bom. 472 (In this case when the certificate was unregistered the High Court ordered the issue of a fresh certificate).

were compulsorily registrable.¹ The exemption of sale certificates from registration granted by a civil or a revenue officer was first declared in the Act of 1877,² which provided for the copies of sale certificates to be forwarded by Courts to registering officers.³

“ Every Court granting a certificate of sale of immoveable property under the Code of Civil Procedure 1908, shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immoveable property comprised in such certificate is situate, and such officer shall file the copy in his Book No. I. Every Revenue Officer granting a certificate of sale to the purchaser of immoveable property sold by public auction shall send a copy of the certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the property comprised in the certificate is situate, and such officer shall file the copy in his Book No. I.”⁴

1. *Mulji v. Anupram*, (1870) 7 B.H.C.R.A.C. 136; *Padu v. Rakamai*, (1873) 10 B.H.C.R. 435; *Lal Bhai v. Kamaluddin*, (1875) 12 B.H.C.R. 247; *Harkristen v. Bai Ichha*, (1879) 4 Bom. 155. See also *Panha v. Fatta*, (1875) 12 B.H.C.R. 179.

2. Section 17 (2) xii and S. 89 Cl. (2) and (4)

3. “ Although sections 17, 32, 58, 61 and 89 of that Act (III of 1877) except sale certificates from the ordinary procedure in registration, it was said in the Notes accompanying the first draft of the Bill that “ They leave it doubtful whether the action of the Court does or does not complete the registration of the certificates. The procedure laid down in the case of sale certificates would seem sufficiently to meet the requirements contemplated by registration.” It was accordingly proposed in the first draft to declare by an addition to section 89 of the Registration Act on the lines of section 81 of that enactment, that the filing of such copy or copies shall have the same force and effect as registration. But this proposal has been adopted.”

4. Act XVI of 1908, s. 89.

A sale certificate a copy of which is sent to the registering officer under section 89 is not a registered document within the meaning of Article 10 of Schedule II of the Limitation Act.¹

A purchaser of land at a court-sale in execution of a decree for money does not acquire priority by registering his certificate of sale, against a mortgagee or a purchaser whose mortgage or purchase is optionally registrable and unregistered but prior in date to the institution of the suit.²

Although section 316 of C.P.C. says that the sale certificate shall bear "the date of confirmation of the sale" that provision cannot alter the fact of execution or the time when the certificate is actually executed, which gives the starting point from which the four months mentioned in section 23 of the Registration Act must be computed and presentation for registration within four months of the date of actual execution is in time.³

Under the C.P. Code of 1859 (S. 259) a certificate was granted to the purchaser to the effect that he had purchased the right, title and interest of the judgment-debtor in the property sold and such certificate shall be taken and deemed to be a valid transfer of such right, title and interest. In construing this latter expression, it was thought that the transfer of title was effected not by the sale but by

Value of
certificate.

1. *Fatte Singh v. Daropadi*, (1908) P.R. 142 F.B.; *Sirajunnissa v. Jan Muhamad*, (1882) 2 A.W.N. 51.

2. *Ramaraja v. Arunachela*, (1884) 7 Mad. 248; *Narasayya v. Jangam*, (1884) 7 Mad. 418; *Ramachandra v. Krishna*, (1886) 9 Mad. 495; *Sobhagchand v. Bhaichand*, (1882) 6 Bom. 193 F. B.; *Rupchand v. Davlatrav*, (1882) 6 Bom. 495; *Magan Lal v. Shakra Girdhar*, (1898) 22 Bom. 945; *Lakhmichand v. Kastur*, (1872) 9 B.H.C.R. 60; *Manmal v. Dashrath*, (1872) 9 B.H.C.R. 147.

3. *Husaini v. Mulo*, (1882) 5 All. 84.

the certificate of sale, so that when the certificate was invalid for want of proper registration under the Registration Act (VIII of 1871), the purchaser got no right to the property.¹

In *Buhuns Koonwar v. Buhoree Lall*,² the Privy Council however pointed out that that section did no more than create statutory evidence of transfer in place of the old mode of transfer by bill of sale and accordingly the Code of 1877 omitted the words that appeared to imply that the certificate effected the transfer.³ The order affirming the sale of immoveable property in execution is sufficient to pass a title to the purchaser and the sale certificate is merely evidence that the property passed.⁴ Before the grant of the certificate the purchaser must be deemed to have a title equitable or inchoate,⁵ and can therefore perfect his title at the hearing of the cause,⁶ and on confirmation, the title relates back to and the property vests as at the date of the sale,⁷ and his title cannot be disputed by the parties

1. *Harkisandas v. Bai Ichha*, (1879) 4 Bom. 155; *Padu v. Rakkmairi*, (1873) 10 B.H.C.R. 435; *Srinivasa v. Seshayyengar*, (1881) 3 Mad. 37 F.B.

2. (1871) 14 M.I.A. 496 (523).

3. *Prakash v. Tarachand*, (1882) 9 Cal. 82 (87) F.B.

4. *Doorga Narain v. Baney Madhub*, (1881) 7 Cal. 199 (207); *Tara Prasad v. Nund Kishore*, (1883) 9 Cal. 842; *Naigar v. Bhaskar*, (1886) 10 Bom. 444; *Promothonath v. Sourav Dasi*, (1920) 47 Cal. 1108. See also *Chintamanrav v. Vithakai*, (1887) 11 Bom. 588 (where certificate was not registered).

5. *Nanjundepa v. Hemapa*, (1884) 9 Bom. 10; *Yeshwant v. Govind*, (1886) 10 Bom. 453; *Dagd v. Panchamsing*, (1892) 17 Bom. 375; *Bhawani Koer v. Mathura Prasad*, (1907) 7 C. L. J. 1; *Adhur Chunder v. Aghorenath*, (1898) 2 C. W. N. 589; *Nagina Singh v. Puran Chand*, (1906) P. R. 11; *Chiddo v. Piari Lal*, (1896) 19 All. 188; *Banke Lal v. Jagat Narain*, (1900) 22 All. 168; *Zalim Singh v. Kalloo Singh*, (1907) 10 O. C. 273.

6. See *Krishnaji v. Ganesh*, (1882) 6 Bom. 139.

7. *Bhyrub v. Saudamines*, (1876) 2 Cal. 141 F.B.; *Chatrapat v. Grindra Chunder*, (1881) 6 Cal. 389 (391).

bound by the sale even though no certificate of sale was obtained.¹

Apart from the evidentiary value of the certificate of sale the Bombay High Court thought that for suits in ejectment against other persons based on a legal title a certificate was necessary,² though it was not so in suits for redemption or the like of an equitable character;³ so when the sale was admitted,⁴ or where the question arose between the auction-purchaser and persons bound by the decree,⁵ no certificate need be produced. It was held in some cases if the sale was not admitted, it could be proved *aliunde* and no distinction was observed as in Bombay, between legal and equitable rights.⁶

“ Under the Code of 1877 and subsequently, an order for delivery of possession only issued after the grant of a certificate,⁷ and with regularity of practice in this respect the importance of the question appears to have gradually diminished.⁸

Under the Code of 1877, as amended in 1879, the certificate was required to bear the date of con-

Date of
certificate.

1. *Shivaram v. Raoji*, (1882) 7 Bom. 254; *Sanwal Singh v. Prag Dutt*, (1914) 25 I. C. 8.

2. *Kushal v. Bhimabai*, (1886) 12 Bom. 589; *Budhu v. Hira*, P.R. 27 (1892).

3. *Ibid.*; *Krishnaji v. Ganesh*, (1881) 6 Bom. 139.

4. *Sadagopa v. Jamuna Bhai*, (1882) 5 Mad. 54 (60); *Velan v. Kumarasami*, (1887) 11 Mad. 296; *Durga Narain v. Baney Madhub*, (1881) 7 Cal. 199 (207); *Naigar v. Bhaskar*, (1886) 10 Bom. 444.

5. *Khushal v. Bhimabai*, (1886) 12 Bom. 589 (594); *Benodi Lal v. Tamizuddin*, (1880) 7 C.L.R. 115; *Shivram v. Rowji*, (1882) 7 Bom. 254; *Budhu v. Hira*, (1892) P.R. 27; *Raj Kishen v. Radha Madhub*, (1874) 21 W. R. 349.

6. *Khushal v. Bhimabai*, (1886) 12 Bom. 593; *Jagannath v. Ba'deo*, (1883) 5 All. 305 F. B.; *Velan v. Kumarasami*, (1887) 11 Mad. 296; *Bhawani Koer v. Mathura Prasad*, (1907) 7 C. L. J. 1.

7. *Basapa v. Marya*, (1879) 3 Bom. 433; *Kushal v. Bhimabai*, (1886) 12 Bom. at p. 594.

8. AMIR ALI and WOODROFFE, C.P.C., p. 306.

firmation and so far as regards the parties to the suit and persons claiming through or under them "the title to the property" vested in the purchaser from the date of the certificate, that is, of confirmation, and not the date of the sale.¹ A question arose therefore as to the state of the title to the property between the dates of sale and of confirmation. Though the expression "title to the property sold" in section 316 meant only the full perfected title that did not vest in the purchaser till confirmation, that circumstance did not negative the existence of an inchoate equitable interest short of the full perfected title in the purchaser even before the certificate issues. "And the facts that the transaction which takes place at the time of the auction is called a sale, that a cancellation of it is called the setting aside of a sale, that a subsequent auction after the failure of the first is called re-sale all these things show that in the contemplation of the legislature the transaction even before confirmation and issue of certificate is a sale though a sale liable to be set aside." It is not merely a contract of sale but something more than it. The new words in section 316 as to the date when the title to the property sold shall vest seem to be technical and to point to the complete title arising on the sale becoming absolute, such as might be requisite to enable the purchaser to bring a suit in ejectment, but distinguishable from the inchoate title which suffices for a suit of an equitable nature.²

1. *Premchand v. Purniama*, (1888) 15 Cal. 546; *Shiam Lal v. Nathe Lal*, (1910) 7 I.C. 65.

2. *Dagdu v. Pancham Singh*, (1892) 17 Bom. 375; *Chiddo v. Piari Lal*, (1896) 19 All. 188; *Het Ram v. Baldeo*, (1894) A.W.N. 54; *Prem Chand v. Purnima Dasse*, (1888) 15 Cal. 546; see also *Prangour v. Himanta Kumari*, (1886) 12 Cal. 597; *Sharoda Prasad v. Luchimput Singh*, (1872) 14 M.I.A. 529.

So an auction-purchaser can maintain a suit for damages for injury done to the property before the confirmation of sale.¹ A subsequent purchaser, even if the subsequent purchase is first confirmed, takes subject to the inchoate title of the first purchaser, which, on confirmation assumes an absolute superiority.² But if the second sale was held at a time when the first sale had been set aside, the fact that on a suit of the first purchaser, his sale was subsequently upheld would not affect the second purchaser's title.³

Under section 65 of this Code; when the sale is made absolute, the property shall be deemed to have vested in the purchaser from the time when the property was sold and not from the time when the sale becomes absolute. Now, therefore, the purchaser is entitled to mesne profits from the date of sale and not merely from the date of confirmation;⁴ and the purchaser's title is complete enough to enable him to maintain a suit for possession even against a person not a party to the suit in which the sale was held.⁵

1. *Adhur Chunder v. Aghore Nath*, (1898) 2 C.W.N. 589.

2. *Konappa v. Janardan*, (1874) 11 B.H.C.R. 193; *Dagdu v. Pancham Singh*, (1899) 17 Bom. 375; *Yeshwant v. Govind*, (1886) 10 Bom. 453; *Chintamanrav v. Vithabai*, (1887) 11 Bom. 588. See also *Nanakchand v. Teluckdye*, (1880) 5 Cal. 265; *Kutti v. Subramania*, (1909) 32 Mad. 485, in the case of sales in mortgage decrees.

3. *Banke Lal v. Jagatnarain*, (1900) 22 All. 168 (174). See however *Ram Chunder v. Samir Gazi*, (1892) 20 Cal. 25.

4. *Hashmat Ali v. Mahewa Estate*, (1918) 5 O.L.J. 31=45 I.C. 248; *Satyendranath v. Nilkanta*, (1893) 21 Cal. 383. For a different view under the Code of 1882, see *Amir Kazim v. Darbari*, (1902) 24 All. 475; *Shiam Lal v. Nathe Lal*, (1910) 33 All. 63.

5. Under the Code of 1859, it was held that as against third persons, no suit could be maintained without a sale certificate. See page 507 *supra* and cases there cited.

CHAPTER XXI

Void and Voidable Sales

Sales void or voidable—Distinction between 'void' and 'voidable'
 —Void Judgments—Judgments without Jurisdiction—Instances
 —Jurisdiction over person—How it is obtained—Judgment in
 absentum—Jurisdiction over dead persons—Absence of repre-
 sentatives—Judgments against minors—Judgments on unsan-
 ctioned Compromises—Judgments against lunatics—Same princi-
 ples apply in execution—Court of execution must have jurisdiction
 —Jurisdiction by transmission of decree—Jurisdiction in execution
 of cross-decrees—Sale under attachments of two or more Courts
 —Sale of attached decree—Sale must conform to decree—Writ
 must be in accordance with law—Writ must be in force—Autho-
 rity of the selling officer—Sale under Oudh Laws Act—Sale for
 court-fees not due—Sale under Act II of 1864—Sale after stay—
 Sale after satisfaction—Sale under Public Demands Recovery Act
 —Sale without notice under Or. 21, r. 16—Sale without notice
 under Or. 21, r. 22—Sale without notice under Or. 21, r. 66—
 Sale without attachment—Sale at unpublished hour—Failure to
 deposit 25%—Sale in contravention of Or. 34, r. 14—Fraud
 of bidders—Sale to incapacitated persons—Sale of exempted pro-
 perty—Sale of agricultural holdings—Sale contrary to statute—
 Sale against public policy—Sale of stranger's property—Sale
 after reversal—Protection to strangers.

as void or
 dable.

A sale in execution may be void, or voidable. The word 'void' though apparently free from ambiguity is employed in various senses. "Accurately speaking a thing is not void unless it has no force or effect whatever. Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one. Again, a thing may be void in several degrees, 1st, void, so as if never done, to all purposes so that all persons may take advantage thereof, 2nd, void to some purposes only; 3rd, so void by operation of law that he who does or will have the benefit of it may make it good."¹

"All execution and judicial sales commonly designated as void may be divided into two general

1. Freeman on VOID JUDICIAL SALES. 4.

classes, within the one or the other of which all void sales must necessarily fall. There are sales void by reason of the want of authority in the court to make or enter the judgment or decree upon which, or the order of sale under which it is had, and sales based upon valid judgments or decrees, or on sufficient orders of sale which are notwithstanding all this invalid by reason of some vice or irregularity in the proceedings subsequent to the issuance of the execution or the making of the order under which the sale was had. It is manifestly apparent that all sales included in the latter class are not really void. But the former are unconditionally void and of no effect for any purpose and not susceptible of being validated at the instance of any one.

“In its strict legal signification a void act is one devoid of legal force or efficacy, and as a necessary result an absolute nullity, not binding on any one and wholly incapable of ratification, while a voidable act or deed is one which, though being subject to avoidance, cancellation or annulment by reason of some inherent defect or vice, has nevertheless some force or effect, and therefore not an entire nullity. A voidable act is not void in the sense of being incapable of giving rise to rights or obligations and not susceptible of confirmation or ratification expressly or by implication, but on the contrary is capable of being ratified, after which its efficacy is equivalent to that of an original valid act. A voidable act is obligatory on all the world until repudiated by the person with whom it originated, or set aside by competent authority, because of its irregularity and voidable character. It may subsequently be validated in various ways, as by confirmation of

a judicial tribunal, or by ratification of the party himself. The chief element of distinction between a void act or deed and one merely voidable is, that every stranger may take advantage of the former, but not so with the latter.

“The term void does not always mean null and incapable of confirmation; but its true meaning is always to be determined from all the language used and the intent thereby manifested in each particular instance. This rule is an important one in the determination of the distinction between void and voidable acts, a distinction of the highest consequences and of the utmost importance to third persons. Voidness is properly a quality divisible into three distinct degrees, all acts and deeds, popularly designated as being void, must as a necessary consequence fall within one or the other of these degrees. Accordingly an act may be void to the extent that it is as if it had never taken place—an absolute nullity for all intents and purposes, binding no one, and neither creating nor conferring any rights upon any one—void in such a degree that any stranger may assert its invalidity and infirmity at any time and anywhere and take advantage of it at his liberty. This is the strict technical definition of a void act.

“Then an act may be void in a measure only, or for some purposes, but not so entirely without legal efficacy as to be incapable of confirmation or ratification, nor so unconditionally without effect as not to afford protection to innocent parties to whom rights have inured thereunder; such acts are effectual until avoided by some act or proceeding, though acts and deeds are sometimes designated as void because of lacking the element of validity until confirmation, but such are nevertheless only voidable,

because, if strictly void, no validity could be infused therein by such confirmation. And lastly, an act may be void by operation of law to the extent that he who desires to avail himself of its benefits must likewise provide an adequate compensation for the enjoyment he has received. But this also falls within the degree of voidableness, though differing in its general nature.”¹

“A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The purchaser at a sale, based by virtue of its authority finds himself without title and without redress.”²

Void judgment.

Judicial proceedings are void, when the Court, wherein they take place, is acting without jurisdiction. Jurisdiction may be defined “to be the right to adjudicate concerning the subject-matter in a given case. To constitute this there are three essentials: (a) the court must have cognisance of the class of cases to which the one adjudged belongs; (b) the proper parties must be present; and (c) the point decided must be in substance and in effect in issue.”³

Judgments without jurisdiction.

“A judgment is also void in so far as it assumes to deal with parties not before the court,⁴ or with

Instances.

1. KLEBER ON VOID SALES, 70-74.

2. FREEMAN ON JUDGMENTS, S. 117.

3. *Ibid.*, S. 120.

4. *Purnachandra v. Bejoychand*, (1913) 17 C.W.N. 549=18 I.C. 859; *Bal Kishan Lal v. Topeswar Singh*, (1912) 15 C.L.J. 446=14 I.C. 845; *Jadunath v. Afzal Khanam*, (1920) 7 O.L.J. 362=57 I.C. 526; *Venkata v. Chengadu*, (1888) 12 Mad. 168 F.B.; *Veerappa Chetty v. Ramasamy Chetty*, (1920) 43 Mad. 135.

property not within its territorial jurisdiction or though within such jurisdiction not described in the complaint.¹ Many other illustrations may be given of judgments or orders which are void though the Court had jurisdiction of the parties and of some subject-matter before it, because it undertook either to determine some issue not presented by the pleadings or to grant some relief not within such issues. Judgments or orders of this character do not usually result in execution or judicial sales, but when they do, such sales must be declared void, as where the court entered a judgment in an action in which such judgment was entirely unauthorised by the pleadings or undertook to direct a sale of specific real property, when no cause for such sale was shown or the property was not described in the pleadings upon which the judgment or order was based''².

Jurisdiction over a defendant is obtained by his voluntary appearance in the action or service of process upon him in the manner prescribed by law. If a defendant neither appears nor is served with process, a judgment against him is void.³ If the record states that the Court acquired jurisdiction over the defendant or even if it is silent on that subject, jurisdiction will always be presumed.⁴

1. See Vol. I Chap. IV; *Obhoy Churn v. Golam Ali*, (1881) 7 Cal. 410; *Premchand Dey v. Mokhoda*, (1890), 17 Cal. 699 F.B.; *Dakhina Churn v. Bilash Chunder*, (1891) 18 Cal. 526; *Raja Lakshmee v. Kathayanee*, (1911) 38 Cal. 639; *Kunja Mohan Chakravarthy v. Manindra Chandra Roy*, (1923) 27 C.W.N. 542 = 77 I.C. 253; *Abdul Hadi v. Mt. Kabultunnissa*, (1924) 80 I.C. 901; *Balaji Vithoba v. Bal Krishna Raoji* (1895) 9 C.P.L.R. 136.

2. Freeman on VOID JUDICIAL SALES, 19-20. *Nagbhatta v. Nagappa*, (1923) 46 Bom. 914.

3. Freeman on VOID JUDICIAL SALES, 25. If however the service is only irregular, the judgment cannot be assailed collaterally. See *Purna Chandra v. Bejoy Chand*, (1913) 17 C.W.N. 549 = 18 I.C. 859.

4. Ibid. 32. See Vol. I. 120—4.

In a personal action, a decree pronounced by a Court of a foreign state, *in absentum*, the absent party not having submitted himself to its authority, is by International law a nullity.¹

Foreign judgments.

No jurisdiction can be obtained over a person who has no existence. "It is true that if he has been a natural person he may have left heirs and if an artificial person, stockholders or others entitled to share in the distribution of assets, but neither can be estopped from showing that when the action was commenced the defendant, if a natural person, was dead or if a corporation, had been dissolved and hence the judgment void, because the court never had jurisdiction over the supposed defendant."² So a judgment pronounced when the party was dead and no legal representative had been brought on record is of no effect³ and cannot be enforced against the legal representative.⁴ An order in execu-

No jurisdiction over dead persons.

1. See Vol. I, 126; *Viswanatha v. Keymer*, (1916) 39 Mad. 95, affirmed on appeal (1917) 40 Mad. 112 P.C.; *Jeevappa v. Jeerji*, (1916) 40 Bom. 551.

2. Freeman on VOID JUDICIAL SALES, 9—10.

3. Even if in favour of a party, *Ma Min v. Maung Po*, (1916) 10 Bur. L.T. 27=35 I.C. 438.

4. See Vol. I, 124-6. Also *Jahnavi Prasad v. Gharbaran Dubey*, (1916) 35 I.C. 404; *American Baptist Foreign Mission Society v. Amalanadhuni*, (1918) 48 I.C. 859; *Jungli Lal v. Laddu Ram*, (1919) 4 Pat. L.J. 240=50 I.C. 529 F.B.; *Shripat Narain v. Tirbini Misra*, (1918) 40 All. 423; *Ambika Prasad v. Jhinak Singh*, (1923) 45 All. 286; *Balaram Pal v. Kanysha*, (1919) 53 I.C. 548; *Deosaran Lal v. Syedunnissa*, (1912) 16 C.L.J. 571=16 I.C. 58; *Narain Das v. Kalu Ram*, (1920) 2 Lah. L.J. 144; *Amanat Khan v. Miyan Khan*, (1920) 7 O.L.J. 20=55 I.C. 498; *Premraj v. Jawarmal*, (1913) 18 I.C. 381; *Kaliaperumal v. Chidambora*, (1915) 29 I.C. 10; *Unnamalai v. Mathan*, (1917) 33 M.L.J. 413=42 I.C. 530; *Sami Mudaliar v. Muthian Chetty*, (1922) M.W.N. 597; *Tittu Gopalachariar v. Maiyappa Chetty*, (1918) M.W.N. 177=45 I.C. 22; *Narendra Bahadur v. Gopal Singh*, (1913) 17 C.L.J. 634=20 I.C. 506; *Bhanji Singh v. Bhagawati Prasad*, (1920) 16 N.L.R. 138=55 I.C. 449; *Mehta Barkat Rai v. Mt. Ghulam Fatima*,

tion passed against a person dead at the time as well as subsequent proceedings are a nullity.¹ So the sale by a Court of the property of the person who was the heir of a deceased person and who was not made a party to the suit brought by the creditor of the deceased against his estate was held to be a nullity.²

Absence of
representa-
tives.

Indian Courts have properly exercised a wide discretion³ in allowing the estate of a deceased debtor to be represented by one member of the family and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not made parties to the proceedings, if it appears that there was a debt jointly due from the deceased and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control. Where a judge accepted, without a question and without applying his mind to the matter, a statement that a particular person is the representative of deceased person and passed a decree against such representative and in execution of that decree, sold

(1923) 5 Lah. L. J. 1=70 I.C. 929; For the cases of Judgments of Privy Council, see *Deonandan v. Janki Singh*, (1920) 5 Pat. L.J. 314=56 I.C. 322; *Baijnath v. Ravaneshwar Prasad*, (1920) 1 Pat. L.T. 426=58 I.C. 212.

1. *Abdur Rahman v. Krishna Mal*, (1911) P.L.R. 247=11 I.C. 869.

2. *Premraj v. Jawarmal*, (1911) 15 Bom. L.R. 41=18 I.C. 381.

3. See *Kashinath v. Chimnaji*, (1906) 30 Bom. 477; *Ramtaran v. Rameswar*, (1907) 11 C.W.N. 1078=6 C.L.J. 719; *Ramachari v. Duraisami*, (1898) 21 Mad. 167; *Sri Krishnasami Iyengar v. Soorikutti Ganapati Iyer*, (1921) 14 L.W. 638=63 I.C. 903; *Chet Ram v. Kanshi Ram*, (1923) 71 I.C. 7. See also *Seshagiri Rao v. Jagannatham*, (1916) 39 Mad. 1031, on appeal (1917) 20 M.L.T. 479=37 I.C. 387. See also *Fani Bhushan v. Surendranath*, (1921) 35 C.L.J. 9=64 I.C. 25.

the property of the deceased, such sale is without jurisdiction and null and void, if not a case of erroneous decision.¹

Execution cannot proceed against a judgment-debtor who is dead and whose representatives are not on record.² Where a decree-holder who had notice of the death of the judgment-debtor purchased the property sold in execution of the decree, without bringing his legal representatives on record, it was held that the omission to bring the legal representatives on record was not a mere irregularity and the sale was a nullity against them.³ When an execution-sale which has become final was impeached in the appellate Court as a nullity on the ground that one of the two judgment-debtors had died and the sale was held without notice to his heirs, it was held that the point was not taken at any stage of the suit and no opportunity was given to show that the surviving judgment-debtor was entitled to represent the heirs of the deceased, and that it was impossible upon the facts, as found, to say that the sale was a nullity.⁴

A decree against a minor not represented or not properly represented is a nullity,⁵ but the

Judgments
against
minors.

1. *Khairajmal v. Daim*, (1904) 32 Cal. 296 P.C.; *Beni Prasad v. Mukhtesar*, (1899) 21 All. 316; *Rashidunnissa v. Muhammad*, (1909) 31 All. 572 P.C.; *Ruhini Nandan v. Rajendra Nath*, (1921) 61 I.C. 291; *Payidamma v. Lakshminarasamma*, (1915) 38 Mad. 1076.

2. *Ramswarup v. Raghunandan*, (1924) Mad. 165=78 I.C. 1031.

3. *Rayarappan Nambiyar v. Malikandi Aketh Mayan*, (1914) 26 M.L.J. 267=23 I.C. 251.

4. *Bhadai v. Manowar*, (1919) 4 Pat. L.J. 645=52 I.C. 125. See *Lakshmi Charan v. Srish Chandra* (1911) 13 C.L.J. 162=9 I.C. 584.

5. *Daji v. Dhirajram*, (1888) 12 Bom. 18; *Dakeshwar v. Rewat*, (1897) 24 Cal. 25; *Bhura Mal v. Har Kishan*, (1902) 24 All. 383; *Hanuman Prasad v. Muhammad Ishaq*, (1905) 28 All. 137; *Dina v. Bahawal Baksh*, (1882) P.R. 100; *Ghulam Abbas v.*

absence of a formal order appointing the guardian does not vitiate the proceedings,¹ if it appears that the case was properly conducted on his behalf,² but not otherwise.³ If a guardian *ad litem* is appointed when the defendant is a major, the decree is a nullity.⁴ The appointment of a guardian who does not consent to act as such,⁵ or who is incompe-

Munnal Lall, (1907) 10 O.C. 321 ; *Musammatt Ido v. Rulia*, (1910) P. R. 35=6 I.C. 663 ; *Pokhpal Singh v. Chhidu Singh*, (1912) 9 A.L.J. 653=15 I. C. 903 ; *Partab Singh v. Bhabuti Singh*, (1913) 35 All. 487 P.C.; *Sadashiv v. Trimbak*, (1920) 44 Bom. 202 ; *Purnachandra v. Bejoy Chand*, (1913) 18 C.L.J. 18=18 I.C. 859 ; *Narsing Narain v. Jahi Mistry*, (1912) 15 C.L.J. 3=13 I.C. 414 ; *Dinabandhu v. Mashuda Khatun*, (1912) 16 C.L.J. 318=17 I.C. 263 ; *Rampir v. Thakur*, (1921) 2 Pat. L.T. 617=63 I.C. 484 ; *Dhanpat Mal v. Khazana*, (1897) P.R. 67.

1. *Janki Das v. Mohabir Prasad*, (1914) 22 I.C. 240 ; *Narain Das v. Ralli Bros.*, (1915) P.R. 61=31 I.C. 45 ; *Silam Kalia v. Silam Sitama*, (1916) 9 Bur. L.T. 158=33 I.C. 941 ; *Mata Ghulam v. Sital Prasad*, (1923) 26 O.C. 113=74 I.C. 409 ; *Darshan Singh v. Ratan Lal*, (1924) Oudh 178=74 I.C. 821 ; *Keshawesarindra v. Debendra Bala*, (1919) 4 Pat.L.J. 213=48 I.C. 245 ; *Ram Ashray v. Sheonandan*, (1917) 1 Pat. L.J. 573=35 I.C. 868.

2. *Hari v. Bhubaneshwari*, (1889) 16 Cal. 40 P.C.; *Kedar v. Protap*, (1893) 20 Cal. 11 ; *Walian v. Banke Behari*, (1903) 30 Cal. 1021 P.C.; *Sayad Amin v. Sheikh Masleuddin*, (1916) 40 Bom. 541 ; *Keshawesarindra v. Debendra Bala*, (1918) 4 Pat. L.J. 213=48 I.C. 245 ; *Narain Das v. Ralli Bros.*, (1915) P.R. 61=31 I.C. 45 ; *Udham Singh v. Gurdip Singh*, (1919) P.W.R. 39=49 I.C. 954.

3. *Partab Singh v. Bhabuti Singh*, (1913) 35 All. 487 P.C., *Bhagwan v. Param*, (1915) 37 All. 179 ; *Hanuman v. Muhammad*, (1906) 28 All. 137. See also *Maruthamalai v. Palani*, (1912) 37 Mad. 535.

4. *Ghanshyamdas v. Hardei*, (1916) 2 O.L.J. 562=32 I.C. 380.

5. *Braijnath v. Dharam Deo*, (1916) 38 All. 315 ; *Bali Kishan v. Topeswar Singh*, (1912) 15 C.L.J. 446=14 I.C. 845 ; *Krishna Chandra v. Jogendra Narain*, (1915) 20 C.L.J. 469=27 I.C. 139 ; *Annada Prasad v. Upendra*, (1922) 34 C.L.J. 293=65 I.C. 18 ; *Shaikh Saijad v. Sakai Rai*, (1922) 2 Pat. 7 ; *Mohan Krishna v. Har Prasad*, (1917) 40 I.C. 2. See *Suraj Deo v. Sarjug Prasad*, (1917) 2 Pat. L.J. 390=40 I.C. 227 ; *Jagadish v. Harihar*, (1924) 40 C.L.J. 39=78 I.C. 219.

Consent need not be express : *Chatter Singh v. Tej Singh*, (1921) 43 All. 104 ; *Vasireddi Sriramulu v. Lakshminarayana*, (1925) 47

tent,¹ or whose interests are adverse to that of the minor,² does not amount to a valid representation. So if in a suit on a mortgage executed by the father,³ or manager of a family,⁴ the father or manager is appointed guardian *ad litem* of the minor sons of other members of the family and a decree is passed on confession, the minors are not properly represented and the decree is a nullity.

Where a Court, after knowing the existence and address of the natural guardian of minor defendants in a suit, did not order fresh notice, but appointed an officer of Court as guardian *ad litem* and passed a decree, it was held that the decree and the sale that followed it were illegal and the Court had inherent power to set aside the decree and the sale after impleading the auction-purchaser as party.⁵

A decree passed on a compromise not sanctioned by the Court is not binding on a minor.⁶ So

Judgments on unsanctioned compromises.

Mad. 783, *Jawahur Singh v. Sewa Singh*, (1924) Lah. 97=79 I.C. 572; *Thakur Tajeswari Dutt v. Lakhan Prasad*, (1925) 83 I.C. 290. When there is a certified guardian, service of notice and his non-appearance may be taken to indicate he has no objection to act: *Baijnath v. Radha Rawan*, (1918) 43 I.C. 563; *Thakur Tejeswar v. Lakhan Prasad*, (1923) 2 Pat. 296.

1. *Rashidunnissa v. Muhammad*, (1909) 31 All. 572 P.C.

2. *Sudhir Chandra v. Govinda Chandra* (1918) 45 Cal. 538; *Baijnath v. Dharam Deo*, (1916) 38 All. 315; *Erafanuddin v. Badan Sheikh*, (1919) 51 I. C. 583; *Jumnomal v. Gurdinomal*, (1925) 83 I. C. 913.

3. *Bal Kishan Lal v. Topeswar*, (1912) 15 C.L.J 446=14 I.C. 845. See however, *Thakur Ganeshi Singh v. Shyam Singh*, (1919) 52 I.C. 636.

4. *Murlidhar v. Pitambar Lal*, (1922) 44 All. 525.

5. *Jumbu Ammal v. Natarajan*, (1922) Mad. 485=70 I.C. 867.

6. *Devaluru Vijaya Ramayya v. Devaluru Venkatasubbarao*, (1916) 39 Mad. 853; *Charu Chandra v. Sambhunath*, (1918) 3 Pat. L.J. 255=46 I.C. 358; *Ram Ghulam v. Durga Prasad*, (1921) 6 Pat. L.J. 199=60 I.C. 980; *Hanuman Rai v. Jagdis Rai*, (1917) Pat.

a decree passed on an award delivered on a reference to arbitration in a pending suit without the Court's sanction.¹

Judgments
against
lunatics.

The position of a lunatic is similar to that of a minor, whether adjudged or not under the Lunacy Act, 1858. If the lunatic was not represented by a guardian *ad litem* and a decree is passed against him, a sale of his property in execution of that decree is a nullity and he can resist an action for possession without setting aside the sale.²

Same principles
apply to
execution.

The same principle applies to orders passed in execution. Where an application is made to a Court having no jurisdiction for the issue of execution, an order of that Court not being the proper court is void.³ In cases, therefore, where the decree is void as aforesaid, a sale in execution of such decree is also void, so that he can recover the property from the

77=35 I.C. 675 ; *Bhiwa Jotiba v. Devchand*, (1911) 13 Bom. L.R. 280=10 I.C. 909 ; *Babu Jadunath Singh v. Babu Manohar Lal*, (1903) 6 O.C. 175 ; *Santu v. Abhai Nandan*, (1924) 81 I.C. 297 ; *Lakshmana Chetty v. Chinnathambi Chetty*, (1900) 24 Mad. 326. See *Phulwanti Kunwar v. Janeshar Das*, (1924) 46 All. 575 (it is voidable).

1, *Atma Ram v. Bila Ganpat*, (1912) 15 Bom. L.R. 223=19 I.C. 424. See however, *Hardeo Sahai v. Gauri Shankar*, (1905) 28 All. 35 ; *Uda v. Mulchand*, (1907) P.R. 4 ; *Annada Krishna Dey v. Jogendra Nath Dey*, (1909) 8 C.L.J. 294. If there is no court's sanction the decree is not void but voidable only : *Emnabai v. Fakir Mahomed*, (1922) 15 S.L.R. 165=65 I.C. 50 ; *Mt. Rani Bahu v. Amrit Lal*, (1904) 17 C.P.L.R. 147.

2. *Moothetuth Kanari v. Hari Shenoy*, (1916) 3 L.W. 301=34 I.C. 428 ; *Zaminia Begam v. Nihal Chand*, (1883) A. W. N. 90. See *Narayana v. Kalianasundaram*, (1895) 19 Mad. 219.

3. *Sukhdeo v. Sheo Ghulam*, (1882) 4 All. 382 ; See *Badri Prasad v. Saran Lal*, (1882) 4 All. 359, *Aghorenath v. Shoma Sundari*, (1883) 5 All. 615 ; *Sant Lal v. Umraounnisa*, (1889) 12 All. 96.

purchaser or resist the suit of the purchaser for possession.¹

The provisions of Order 32, C. P. Code, relating to "suits by or against minors" have no direct application in proceedings in execution after the rights of the parties have merged in a good and valid decree. The *lis* in respect of which it is essential that a minor defendant should be represented by a duly appointed guardian is at an end after the decree is passed and in determining whether a minor is sufficiently represented or not in the execution proceedings, the Court is at liberty to look at the substance of the transaction.²

When a guardian *ad litem* is absent from the country and so cannot be served with a notice, he is useless, and the Court should proceed to appoint another guardian. If the sale takes place with such a guardian for the minor, the minor should be considered unrepresented when the sale took place and the sale should be set aside.³ But the absence of representation of a minor by a guardian may not by itself be a sufficient ground to avoid a sale in execution, if the minor had not sustained substantial injury by it.⁴

1. *Hanuman Prasad v. Muhammad Ishaq*, (1905) 28 All. 137 ; *Shambhu Mahto v. Midnapur Zamindari Co.*, (1913) 18 I.C. 90 ; *Chaudhury Krishnayya v. Koripalli Raju*, (1916) 31 M.L.J. 39=35 I.C. 154.

2. *Fani Bhushan v. Surendranath*, (1921) 35 C.L.J. 9=64 I.C. 25. See for sanction required for adjustment of decrees. *Virupakshappa v. Shidappa*, (1902) 26 Bom. 109 ; *Arunachallam v. Ramanadhan*, (1906) 29 Mad. 309.

3. *Absa Beeni v. Moidinsa*, (1907) 17 M.L.J. 179 ; See also *Moidinsa v. Apsa Bivi*, (1911) 36 Mad. 194 ; *Ghulam Abbas v. Munnal Lall*, (1907) 10 O.C. 321 ; *Musammatt Ido v. Rulia*, (1910) P.R. 35=6 I.C. 663 ; *Hirasingh v. Ghulam*, (1918) P.R. 113=48 I.C. 399.

4. *Tekait Krishna Prasad v. Moti Chand*, (1913) 40 Cal. 635 ;

Court of execution must have jurisdiction.

To give jurisdiction in execution, the decree must have been passed by that Court, or the business of the Court that passed the decree must have been transferred to that Court as contemplated in section 150, C. P. Code, or the decree must have been transmitted for execution under the provisions of section 39 C. P. Code. Under section 37 C. P. Code, provision is made for the cessation of Courts which passed the decree.¹

Jurisdiction on transmission of decree.

Under section 38 of the Civil Procedure Code a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Under Order 21, rule 10, where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf or if the decree has been sent under the provisions herein before contained to another court then to such Court or to the proper officer thereof. Under Order 21, rule 5 where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But where the Court to which the decree is to be sent for execution is situate in a different District the Court which passed it shall send it to the District Court of the district in which the decree

Fani Bhushan v. Surendranath, (1921) 35 C.L.J. 9=64 I.C, 25. *Kunhammad v. Kutty*, (1888) 12 Mad 90; See also *Vishnu v. Ramachandra*, (1886) 11 Bom. 130; *Daji Himat v. Dhirajram*, (1887) 12 Bom. 18.

1. See Vol. I, Chap. IV. For cases of transfer of territorial jurisdiction, see also *Tarachand v. Ramnath*, (1906) 4 C.L.J. 473; *Firm of Behari Lal v. Official Receiver, Lahore*, (1924) 78 I.C. 608; *Manavikraman v. Ananthanarayana*, (1924) 46 M.L.J. 250=79 I.C, 806; *Muthukarappa v. Panja Kavandan*, (1924) Mad. 32; *Mt. Bibi Khodaijatul v. Harihar*, (1925) 4 Pat. 688.

is to be executed. Under Order 21 rule 7 the Court to which the decree is so sent shall cause such copies and certificates to be filed without any further proof of the decree or order for execution or of the copies thereof unless the Court, for any special reasons to be recorded under the hand of the Judge, require such proof. Under Order 21, rule 8, where such copies are so filed, the decree or order may, if the Court to which it is sent is a District Court be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

A consideration of these provisions, shows that until the decree is received by the Court to which the order of transmission is made, that Court cannot receive an application for execution. In *Shuruttoollah v. Gooroochurn*,¹ it was held under the provisions of section 285 of the C. P. Code of 1859, that "an attachment of immoveable property by a Court other than that which passed the decree before the decree has been sent to it for execution vitiates the sale subsequently made of that property, as not being made in strict observance of the procedure prescribed by section 285 of Act VIII of 1859." This is still good law. It cannot be said that the decision in *Arimuthu Chetty v. Vayapuri Pandaram*,² is intended to confer jurisdiction on the Court to which the decree has been ordered to be transferred, before the copy of decree has been received there. In a case where the decree is transmitted from one district to another, a subordinate court of that District cannot acquire jurisdiction, until the District Court of that District

1. (1867) 8 W. R. 310.

2. (1910) 21 M.L.J. 505 (508)=8 I.C. 852.

chooses to transmit the decree to the subordinate Court under Order 21, rule 8, for, under that rule the District Court has the option to execute it itself, or to send it to any other subordinate Court of competent jurisdiction in the district. So in cases in which the Court to which the decree is sought to be transmitted is situate in another District such Court cannot acquire jurisdiction except by an order of transfer by the District Court.¹

The Court to which the decree is transmitted must have jurisdiction to execute it.² After the transmission of the decree to another Court for execution, the former Court ceases to have jurisdiction to execute it, until the copy of the decree is sent back to it under section 41 C. P. Code.³ But this, it appears, does not take away the power of the original Court to order concurrent execution.⁴ After the issue of the certificate under section 41 and return of the decree, the Court to which the decree was transmitted loses jurisdiction.⁵

Jurisdiction
in case of
execution of
cross-decrees.

Under Order 21 rule 18,⁶ where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then if the two sums are equal, satisfaction should be

1. See *Kunja Behari v. Tarapada Mitra*, (1919) 49 I.C. 374.

2. *Kasi Visvanathan Chetty v. Murugappa Chetty*, (1918) 33 M.L.J. 750=43 I.C. 79; *Amrit Lal v. Murlidhar*, (1923) 1 Pat. 651.

3. *Maharaja of Bobbili v. Narasaraju*, (1916) 29 Mad. 640 P.C.; *Jnanendranath v. Kumar Jogendra*, (1922) 2 Pat. 247.

4. *Saraswati Prasad v. People's Industrial Bank Ltd.*, (1917) 15 A.L.J. 532=39 I.C. 729.

5. *Shiam Lal v. Koerpal*, (1924) 22 A.L.J. 1039; *Syed Md. Shakir v. Jugal Kishore*, (1924) 10 O. & A.L.R. 1277.

6. This corresponds to S. 246, Old Code. See Vol. I, 41-50 270,

entered on both the decrees; and if the two sums are unequal, execution shall be taken out only for the difference. If however in contravention of the provisions of this rule, the Court allows execution to issue for the smaller sum and a sale is held, the sale is not void for want of jurisdiction. In *Rewa Mahton v. Ramkishen*,¹ the Privy Council said "notwithstanding anything in section 246 C. P. Code (now O. 21. R. 18) the purchaser is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued has been satisfied or not. These questions fall within the jurisdiction of the Court issuing execution."

Under section 63, C.P. Code, where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property shall be the Court of highest grade or where there is no difference in grade, the Court under whose decree the property was first attached. Under the corresponding section 285 of the C. P. Code of 1882 there was a difference of opinion on the nature of this rule, whether it was a rule of procedure only or whether it affected jurisdiction. The former view was held in Calcutta, Bombay and Madras and the latter in Allahabad.² Again if in the case of attachment of the same property by Courts of different grades, the property is sold by

Sale under attachment by two or more courts.

1. (1887) 14 Cal. 18 P.C; *Sinnu Pandaram v. Santhoji*, (1902) 26 Mad. 428.

2. See page 416 *supra*. *Gopi Chand v. Kasimunnessa*, (1907) 34 Cal. 836; *Ram Narain v. Mina Koery* (1897) 25 Cal. 46.

both the Courts, and is purchased by two different persons, it was held in Calcutta¹ that the purchase at the sale by the Court of the lower grade would be valid only if the purchaser *and* the Court had no notice of the attachment by the Court of the higher grade, but in Bombay and Madras² it was held that notice to the inferior court of the attachment by the superior court was immaterial. In *Abdul Karim v. Thakurdas*,³ it was said "A distinction must be drawn between the acts of a Court done without jurisdiction or authority and those done in the irregular exercise of an admitted authority or jurisdiction. If an attachment in a higher Court deprives a Court of lower grade of jurisdiction to sell, the sale must be invalid, whether the lower Court knows of it or not. If the sale is held to be in such cases only irregular, the purchaser will take an indefeasible or a defeasible title according to whether he knows or does not know of the irregularity."

Under the C.P. Code, 1908, a new sub-section has been added "nothing in this sub-section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees." The result of this addition is to make the rule in sub-section (1) a rule of procedure only and the view that a sale by the Court of the lower grade is void under any circumstances is no longer law.⁴

1. *Bykant Nath v. Rajendro Narain*, (1886) 12 Cal. 333.

2. *Abdul Karim v. Thakurdas*, (1898) 22 Bom. 88; *Patel v. Haridas*, (1893) 18 Bom. 458; *Kunhayan v. Ithukutti*, (1899) 22 Mad. 295; *Himmat Singh v. Bhagwat*, (1900) 13 C.P.L.R. 145.

3. (1898) 22 Bom. 88.

4. See page 416 *supra*; *Girischandra v. Sri Krishna De*, (1924) 38 C. L. J. 266=75 I.C. 325; *Narayanan v. Tawker*, (1917) 33 M.L.J. 217=41 I.C. 612; on appeal from (1916) 32 I.C. 927. See also *Vishnu v. Yusuff*, (1925) 27 Bom. L.R. 963.

When property attached by a Court of a higher grade is subsequently attached by a Court of a lower grade and is sold by the latter in execution of its decree the sale is now valid. When subsequent to the sale by the District Munsiff, the holder of a decree in the Sub-Court applied for sale of the same property in execution of his decree, the former purchaser can under section 47 C.P. Code apply to the Sub-Court to stop the sale on the ground that the title to the property had passed to him and ceased to be in the judgment debtor.¹ In such case it was held that the Subordinate Judge should not direct the Munsiff to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred and the sale proceeds should then be rateably distributed under Section 73 C.P. Code.²

But in spite of the absence of any reservation in this new sub-section,³ the Madras High Court appears to cling to a limitation of notice and good faith. In *Subbiah v. Muthukumarasamia*,⁴ it was held that when property was attached in execution of the decrees of two separate Courts, a sale by the Court of lower jurisdiction was irregular but not in-

1. *Srinivasa v. Appavoo*, (1924) Mad. 889=47 M.L.J. 720, (On such an application it is open to the Court to inquire whether the decree of the District Munsiff was vitiated by fraud or on any other ground).

2. *Nilkantha Rai v. Gosto Behari*, (1919) 46 Cal. 64; *Ramhari Lal v. Nathu Ram*, (1921) 6 Pat. L.J. 332=62 I.C. 33; *Deekappa v. Chanbasappa*, (1925) 27 Bom. L. R. 917; See also *Bykant Nath v. Rajendro Narain*, (1886) 12 Cal. 333; *Patel v. Haridas*, (1894) 18 Bom. 458.

3. See *Srinivasa v. Appavoo*, (1924) Mad. 889=47 M.L.J. 720.

4. (1916) 32 I.C. 41 [following *Abdul Karim v. Thakurdas*, (1898) 22 Bom. 38]. See also *Peetiyakkal Vattaka v. Marakkarakath Ahammad*, (1914) 25 I. C. 906.

valid, and a purchaser would take an indefeasible or a defeasible title according to whether he did or did not know of the irregularity ; the burden of proof is upon the purchaser to show that he made the purchase bona fide and without notice of the pre-existing attachment ; in order to determine whether a purchaser had notice or not the test to be applied is, whether he acted in good faith without being aware, whether by direct and formal notice or otherwise that his title was liable to be questioned by reason of the superior Court's attachment. In *Narayanan v. Tawker*,¹ it was also expressly said that mere notice to the Court which ordered the sale cannot oust the jurisdiction.

Sale of
attached
decree.

If a decree in favour of a judgment-debtor is attached in execution of a decree against him the Court ought, under O. 21, R. 53, C.P.C., to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. The Court has no power to sell the attached decree and such a sale is invalid.²

Sale must
conform to
decree.

When the Collector to whom the decree was transferred for execution was only empowered to sell that property which the Court ordered him to sell, and the collector sold the same in excess of what was saleable under the decree, the sale was held to be *ultra vires*.³

In some cases it is stated as a general rule that a sale made under a decree in equity must pursue

1. (1916) 32 I.C. 927 (where there is a learned discussion on the mode of setting aside the sale) affirmed (1917) 41 I C. 612.

2. *Vithaldas Prabhu v. Surrayya Manjappa*, (1921) 45 Bom. 343.

3. *Nazar Ali v. Kedarnath*, (1897) 19 All. 308.

the directions therein contained, and that a material departure from such directions in the conduct of the sale renders it void. However, before this rule can be invoked, on principle and authority, the departure must be of a very material character and of such nature that it is not cured by the order of confirmation which was entered in due form by the court having authority to enter it. Unless the departure involves a matter of important materiality within the category of defects which are not adjudicated and cured by the order of confirmation properly entered upon the report of the sale, a departure from the order or decree of sale does not produce a fatal infirmity in the sale, and therefore does not expose it to impeachment in a collateral proceeding. And even in case of a material departure, if it is such a departure as might have been originally incorporated in the decree, the defect is cured by the order of confirmation."¹

"Notwithstanding a valid decree or order of sale has been made authorizing the sale of certain lands therein designated and belonging to the decedent, if the administrator advertises and sells land not embraced in the order of sale, the proceedings are obviously without authority and absolutely void as to the land not included in the order or license. That the order was modified subsequent to the sale is of no avail. The defect is a fatal jurisdictional infirmity incapable of being cured by confirmation by the court."²

"The writ of execution is issued upon a judgment or decree for the purpose of enforcing it, and is the final process in the suit, being an authority emanat-

Writ must be in accordance with law.

1. KLEBER ON VOID SALES, 244-5.

2. Ibid. 312.

ing from the commonwealth. Accordingly, to be effective it is indispensable that it contains the description of a judgment and disclosing upon its face the authority for its issuance. Consequently it is essential that it purports to emanate from competent authority. It is a paramount requisite that there be no substantial defects in the form of the writ, and it must embody a direction to the officer who receives it for execution to proceed to obtain satisfaction of the judgment upon which it is founded. Therefore, it is a general rule that conformance to the judgment is imperative, and a material variance therefrom vitiates the writ. While the principle is susceptible of comprehension without difficulty, its application is environed with interminable perplexities and enveloped with a bewildering conflict of judicial enunciations. Error or omissions of merely formal parts of a writ will not render it voidable for this reason. So it has been held that a misdescription by way of a recital of a judgment in an excessive amount is equivalent to the case of no judgment, the variance being considered material and fatal to the writ, while on the other hand a similar defect is considered nothing but a mere irregularity, not of sufficient gravity to destroy the identification of the judgment, and the writ is voidable only in consequence thereof."¹

Writ must be in force.

"That the sale must be made under authority both valid and subsisting is elementary; consequently, if the sale is made under an execution or other authority which was once sufficient, but which through lapse of time has lost its efficacy, the sale can be considered in no other light than that it was made without authority and is void. Accordingly,

1. KLEBER ON VOID SALES, 250. See page 48 *supra*.

after its return day, the execution is *functus officio*, whether it has been returned or is still in the hands of the officer, and after it has thus expired by its own limitations, it furnishes not the least pretence of power to the officer to make a levy and sale thereunder. A levy of an execution made subsequent to the expiration of the active energy of the writ is an absolute nullity, and the sale thereunder is void. But a sale made subsequent to the expiration of the active energy of the writ is valid provided, however, that the levy was effectuated prior to such time."¹

"In Michigan and North Carolina it is held an execution issued upon a judgment barred by the lapse of time is insufficient to confer any right to sell, and consequently a sale thereunder is wholly ineffectual to pass title to the property ; but if the writ is issued before the bar of the statute has become complete the sale may be made thereafter and a good title acquired by the proceedings of sale "²

"In the absence of a disqualification to act, all sales under execution must be made by the sheriff or constable, to whom the same is legally and properly directed, and when the writ is directed to the sheriff generally as such, by a duly appointed deputy acting for and in the name of the principal officer in this regard. As a general rule the writ confers no authority upon any other officer except the one to whom it is directed. So strict is this rule enforced requiring the writ to be executed by the officer to whom it is directed, that a sale made under it by one other than the proper officer to whom it was directed, but by one to whom it might have been addressed, is without any validity."³

Authority of
selling officer.

1. KLEBER ON VOID SALES, 281.

2. Ibid. 282.

3. Ibid. 276.

Sale under
Oudh Laws
Act.

The Court has no jurisdiction to sell land in contravention of the terms of S. 20, Oudh Laws Act (XVIII of 1876) and if it does so the purchaser acquires no title.¹

Sale for
court-fees
not due.

A sale held for court-fees wrongly believed to be due to the Crown, while they were not actually so due, is invalid and the order for such sale is *ultra vires*.²

In *Ragho Prasad v. Mewa Lal*,³ the respondents obtained a decree for sale on their mortgage on the 17th of December 1895. Pending execution the wife of the mortgagor brought a suit *in forma pauperis* against her husband and his mortgagees for dower, alleging that it was a charge on the mortgaged property in priority to the mortgage lien. It was found that the dower debt was not charged on the property, and on the 11th of May 1897 her suit was dismissed as against the mortgagees, and a money decree passed against her husband alone; and under section 411 of the Civil Procedure Code (XIV of 1882) the amount of the court-fees due to Government was made a first charge on the amount decreed. Notwithstanding that the decree expressly dismissed the suit as against the mortgaged property, the Collector, in order to recover the court-fees in the pauper suit brought it to sale, on the 22nd of July 1899, in execution of the decree of the 11th May 1897 and recovered just enough to satisfy them. On the application of the respondents the civil Court directed that the property should be again put up

1. *Sheikh Abdul Ghafar v. Raghubar Singh*, (1905) 8 O.C. 409. See also *Fatmatul Kubra v. Achchi Begam*, (1913) 36 All. 33; *Dulip Narain v. Parmaoti Bibi*, (1919) 42 All. 58.

2. *Balwant Rao v. Muhammad*, (1893) 15 All. 324.

3. (1912) 34 All. 223.

for sale in execution of the respondent's decree of the 17th of December 1895, and on the 20th of September 1902 it was purchased at that sale by the respondents who got formal possession. The purchaser under the decree of the 11th of May 1897, now represented by the appellants, had, however, then obtained possession, and there was a contest for mutation of names which resulted in the revenue Courts upholding the right of priority of the Government for the court-fees and the possession of the appellants. It was held in a suit in the civil Court by the respondents to enforce their priority and for possession, that the decree of the 11th of May 1897 did not create, nor purport to create any charge on the mortgaged property and that the sale under it of the 22nd of July 1899, being a sale of the property of the defendant in the suit for dower to satisfy a debt of the plaintiff in that suit, was without jurisdiction, and passed no title to the purchaser.

In *Thakur Barmha v. Jiban Ram Marwari*,¹ certain property to be sold under a decree was described in the schedule to the application for execution and in the proclamation of sale as a six-anna share of a mahal subject to an existing mortgage; and after the sale had been confirmed the auction-purchasers applied for a certificate of sale, and, alleging that a mistake had been made in the schedule by the omission of the word "not," asked to have the purchased property declared in the certificate to be a six-anna share of the mahal *not* encumbered by the mortgage. The alleged mistake was stated to have been corrected before the sale by an advertisement in the Calcutta Gazette.

1. (1914) 41 Cal. 590 (P.C.)

The Subordinate Judge granted a certificate of sale in that form, and his order was upheld by the High Court. It was said (reversing those decisions), that "what is sold at a judicial sale can be nothing but the property attached, which in this case was the property described in the schedule in the execution proceedings. It was not a case of misdescription which might have been treated as an irregularity. Identity and not description had here to be dealt with. An existing property was accurately described in the schedule and the order of the Subordinate Judge granted a sale certificate which stated that another and a different property had been purchased at the judicial sale. If by mistake the wrong property was attached and sold, the only course was for the decree-holders to commence the execution proceedings over again. The advertisement in the Gazette purporting to correct the alleged mistake could not validate a sale of property which was not that to which the attachment related. The order of the Subordinate Judge was made without jurisdiction as there was no power to sell in the judicial proceedings the property which the certificate of sale declared had been purchased and their Lordships set aside the order confirming the sale together with the sale certificate granted thereunder."

Where a person bids for the right to sell toddy in certain places and his bid is accepted, but he fails to make payment according to notification and Government resells the right at a loss, the sum recoverable from the renter to make good the loss to Government by the resale cannot be treated as revenue, and a sale of his property under the provisions of Act II of 1864 is *ultra vires* and when

the property is sold and the purchaser put in possession, a suit by the renter to recover possession of the property is not affected by section 59 of Act II of 1864, but may be instituted within twelve years under the Indian Limitation Act.¹

A sale held after an order of postponement is a nullity, though the officer conducting the sale was not aware of it.² On an order for stay of execution made by an appellate Court, the lower Court ceases to be capable of further action in those proceedings and a sale notwithstanding such stay is void for want of jurisdiction.³ Where the order staying the sale is subsequently set aside on the ground of fraud, the effect is as if the order had never been made, so that a sale held during the existence of the order is valid and cannot be set aside.⁴ When by an order of Court certain property which had been ordered to be put up for sale in execution was released from attachment but before the order could reach the officer holding the sale the sale had been concluded the sale was invalid.⁵

Sale after stay.

1. *Raman v. Chandan*, (1891) 15 Mad. 219. See also *Raman Naidu v. Bhassoori Sanyasi*, (1903) 26 Mad. 638.

2. *Santilal v. Umrao-unnissa*, (1889) 12 All. 96; *Brahm Singh v. Bhandu*, (1921) 19 A.L.J. 225=62 I.C. 687; *Ratan Singh v. Dular Singh*, (1906) 9 O.C. 289.

3. *Hukumchand v. Kamalanand*, (1905) 33 Cal. 927; *Ramanathan v. Arunachellam*, (1913) 38 Mad. 766; *Brahm Singh v. Bhandu*, (1921) 19 A.L.J. 225=62 I.C. 687. See also *Venkatachalapati v. Kamesvaramma*, (1917) 41 Mad. 151 F.B.; *Sinnappan v. Arunachallam*, (1919) 42 Mad. 844 F.B.; *Nonidh Singh v. Sought Kooer*, (1872) 4 N.W.P. 135; *Maiiha Singh v. Jhow Lal*, (1874) 6 N.W.P. 354; *Mian Jan v. Man Singh*, (1880) 2 All. 686; *Ganga Pershad v. Gopal*, (1885) 11 Cal. 136 P.C. For a full discussion, see Vol. I. 346-8. For a case of injunction, see *Maharaj Bahadur v. A. H. Forbes*, (1923) 1 Pat. 662.

4. *Ganges Flour Mills Co. Ltd. v. Shadi Ram*, (1918) 16 A.L.J. 46=43 I.C. 656.

5. *Jitmal v. Zumberlal*, (1925) Nag. 60=84 I.C. 471.

Sale after
satisfaction.

If the whole amount due under a decree is paid into Court, the decree becomes satisfied without any formal order of the Court recording satisfaction. When a decree has been so satisfied or is in fact satisfied by payment out of Court (and such payment is certified to Court), the Court has no more jurisdiction to order the sale of the property in execution of that decree than it would have had to order the sale of the property of a person totally unconnected with suit and such a sale is void for want of jurisdiction and can be set aside by an application under section 47.¹

“ Payment, as a necessary consequence, destroys the vitality of the judgment, for it has then performed its functions—satisfied its purpose. When once paid it is thereafter a mere nullity, because its efficacy has expired. Pursuant to the suggestion of reason, and the vast preponderating current of judicial authority, when a judgment or decree has been satisfied by payment of the amount thereof, or by other appropriate means, it is unconditionally void, as well as every act thereafter performed under it. It is a self-evident truth that the judgment is the exclusive foundation of the officer's authority to sell and convey the defendant's property, and as an inevitable consequence resultant from the incident of payment or satisfaction, the power of the sheriff is terminated, and his acts must be

1. See Vol. I, 270 ; *Janakdhari Lal v. Gossain Lal*, (1909) 37 Cal. 107 ; *Ram Gopal v. Rajan Sadagar*, (1907) 6 C.L.J. 43 ; *Chunni v. Lalaram*, (1893) 16 All. 5 ; *Balwant Rao v. Muhammad Hussain*, (1892) 15 All. 324 ; *Bulchand v. Zinatunnissa*, (1881) A.W.N. 106 ; *Maung Po v. Annamalay*, (1911) 4 Bur. L. T. 12=9 I.C. 452 ; *Kasturi v. Arunachalam*, (1916) M.W.N. 195=34 I.C. 350. See also *Sangam Ram v. Sheobart Bhagat*, (1880) 3 All. 112 ; *Surendranath v. Bola Ram*, (1918) 45 I.C. 699.

nullities if done under it, because there is no foundation for them, and no right or title can be acquired under them to the property ostensibly sold. The purchaser at an execution sale can be the recipient of no higher rights than are actually conferred upon him by the judgment, and as this has been perpetually terminated by reason of its satisfaction, the sale under execution issued upon it, is absolutely void, as to every one purchasing thereunder whether bona fide even in the absence of a cancellation of the record of judgment. The docket of the judgment is a requisite intended to serve the dual purpose of protecting purchasers from the judgment-debtor and for the judgment-creditor's convenience and benefit, but not for the protection of the purchaser under the judgment. Manifestly, the only purpose of an execution is for the enforcement of what may be payable upon the judgment, which is simply nothing if the same has been satisfied by payment. The good faith with which the purchaser bought is a matter of inconsequential consideration, if the judgment was in fact satisfied prior to the sale, however harsh this rule may seem. If perchance he has been misled, the debtor who has performed all the law requires of him, should not be compelled to suffer in order to obviate his misfortunes, for usually the court has ample power to afford him relief. But if not, then there is no principle of law by which the burden of his error can be thrown upon the debtor who is equally as innocent and free from fault as the purchaser.

“And even if no formal entry of the satisfaction is made, the payment of the judgment terminates the lien, for to hold otherwise would be an inexcus-

able and senseless sacrifice of substance to form and shadow, and repugnant to the modern progressive spirit and policy of the law. Hence an execution defendant whose land has been levied upon and sold under a satisfied judgment, though satisfaction is not shown by the record, may either treat the sale as void, or he may waive such invalidity and institute a suit at law against the execution creditor to recover from him the value of the premises. Consequently, if after the payment of the purchase money and before the execution of the deed, the sheriff becomes apprised of the payment of the judgment, notifies the purchaser thereof and tenders back the purchase money, the deed made by him to such purchaser, who refuses to accept his money from the officer is absolutely void. Such a purchaser can in no way be considered innocent. The authorities are harmonious at least to the extent that if the judgment is in fact satisfied, a subsequent sale thereunder to anyone having either actual or constructive notice thereof, is void and passes no title, for such a purchaser can then not be said to be an innocent or *bona fide* purchaser."¹

Sale under
Public
Demands
Recovery Act.

Under section 10 of the Public Demands Recovery Act (Bengal Act I of 1895), the service of notice is a condition precedent to the validity of a sale of immoveable property in execution of the certificate and a sale held without such notice is a nullity. If the sum has been deposited in the treasury, and the officer overlooked it and issued notice and sold the property, the sale is without jurisdiction ²

1. KLEBER on Void Sales, 270-2.

2. *Purna Chandra v. Dinabandhu*, (1907) 34 Cal. 811; *Bepin Behari v. Shashi Bhushan*, (1914) 18 C.L.J. 628=22 I.C. 95; *Nilkanta Narain v. Brajakumar*, (1925) 3 Pat. L.R. 37. The suit

When the transferee of a decree applies for execution, notice must go to the transferee and the judgment-debtor. The provisions of this rule (Order 21 rule 16) are mandatory and non-compliance makes all subsequent proceedings void.¹

Sale without notice under Or. 21, r. 16.

" (1) Where an application for execution is made (a) more than one year after the date of the decree, or (b) against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed, why the decree should not be executed against him :

Sale without notice under Or. 21, r. 22.

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

must be valued on the value of the whole property sold, *Pran Krishna v. Nitya Gopal*, (1924) 50 Cal. 892. In such case Art. 12 of the Ind. Limitation Act is not applicable. Such a suit is not maintainable after grant of the sale certificate, *Sheorutton v. Net Loll*, (1902) 30 Cal. 1 ; *Bhawani Koer v. Afzal Husain*, (1907) 34 Cal. 381. Such a suit is not barred by S. 47 or Or. 91 r. 90, C.P. Code: *Ram Tarrick v. Dilwar Ali*, (1901) 29 Cal. 73 F.B ; *Girish Chandra v. Golam Karim*, (1906) 33 Cal. 451. See the amendment of the Act, by Act I of 1897 which changed the law: *Hari Charan v. Chandra Kumar*, (1907) 34 Cal. 787.

1. C.P.C., O. 21, r. 16. Vol. I. 531-2, where all the cases are cited ; *Mt. Bhagwanta Koer v. Zamir Ahmed Khan*, (1924) 3 Pat. 596.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.”¹

A mere issue of notice is not sufficient, but it must be served in the manner recognised by law.²

“Pursuant to a decided preponderance of judicial authority, based upon reason and principle, executions issued upon dormant judgments, are merely irregular and the sale and resultant title are but voidable at the instance of the execution defendant, and invulnerable upon collateral attack. But the weight of authority is that such irregularity is insufficient to vitiate the sale, which being once consummated, can only be questioned by a direct proceeding in equity instituted for that purpose, upon equitable grounds for relief. The fact that the period designated in the statute has expired, will not satisfy the judgment, raising at best but a mere presumption of satisfaction. The philosophy of invoking the writ of *scire facias*, or where this has been abrogated, then by some other appropriate proceeding substituted therefor, is to extend an opportunity to the debtor showing that the presumption is in fact true. Under the common law rule as well as under statutes, where revivor is provided for, the power to issue the writ is not absolutely abolished by the bar of the statute of limitations, and for this reason, courts have held that when the writ has issued when

1. C. P. C., O. 21, r. 22 (=Old Code, S. 248). See page 10 *supra*.

2. *Gurudas Biswas v. Thakamani*, (1921) 25 C. W. N. 972= 64 I.C. 476; *Anandram v. Nityananda*, (1916) 32 I.C. 744.

the statute has run, and without revivor, it is not void but merely erroneous, and according to the general rule respecting irregularities, the writ is effective and must be obeyed, until properly vacated. A sale under it conveys a good title to the purchaser as against the debtor and subsequent judgment creditors. Because the writ of execution thus issued is irregular, and voidable, it may be quashed upon seasonably interposed motion to that effect on the part of the defendant, to whom alone the right to urge this objection is extended, unless third persons have acquired rights in the property during the interim between the time the judgment became dormant and the issuance of the execution, who stand in a position to urge a similar objection, as a matter of necessity; but not third persons having acquired rights subsequent to the issuance of the writ and subject to its lien. It will be seen that under the current of authority in America an execution purchaser under a writ founded upon a dormant judgment is not without protection. As to him the proceedings are considered valid, unless the defendant utilizes the opportunity afforded him by interposing his motion to quash the writ within a reasonable time, and failing to avail himself of this privilege promptly, the irregularity will be considered waived, and the proceedings unimpeachable thereafter, because of the debtor's own laches. Obviously, in accordance with the decided preponderance of authority, holding the writ voidable only, it is immaterial as to the validity of the proceedings of sale and resultant title, whether the judgment creditor or a third person becomes the purchaser, if no objections are made because the execution issued on a dormant judgment. Yet contention is not

wanting to the effect that, as the plaintiff is chargeable as a matter of law with notice of all irregularities, if he purchases, the sale is void and no title passes to him.¹

The consequence of the neglect to issue a notice under this rule was held to be fatal to the legality of all further proceedings. The issuing of the notice is a condition precedent to the execution of the decree and until notice is issued, the court has no jurisdiction to order a warrant for the execution of the decree and a sale held in pursuance of such warrant would be void² *ab initio* as being held under a warrant for execution irregularly and illegally granted against a person,—judgment-debtor or his legal representative,—who had no opportunity of showing cause why it should be issued, whether the purchaser at the sale is the decree-holder³ or a third person,⁴ and whether the property is immovable or moveable.⁵

1. KLEBER ON VOID SALES, 266-9.

2. *Gopal Chunder v. Gunamoni Dasi*, (1892) 20 Cal. 370; *Mirza Mahomed v. Widow of Balmukund*, (1876) 3 I.A. 241; *Sheo Prasad v. Hira Lal* (1890) 12 All. 440. *Ramasami v. Bhagirathi*, (1883) 6 Mad. 180; See *Parashram v. Balmukund*, (1908) 32 Bom. 572 (notice to judgment-debtor after one year *Maharaj Bahadur Singh v. Indar Chand*, (1917) 26 C. L. J. 130=41 I. C. 853; *Bepin Behari v. Kanti Chandra*, (1913) 18 I. C. 715; *Ram Kinkar v. Sthithiram*, (1918) 27 C. L. J. 528=46 I.C. 221; *Gurudas Biswas v. Thakamani*, (1921) 25 C.W.N. 972=64 I.C. 476; *Shyam Mandal v. Satinath*, (1916) 44 Cal. 954; *Kasivisvanathan Chetty, v. Soma-sunduram Chetty*, (1922) 45 Mad. 875; *Maharaja Bahadur Singh v. Surendra Narayan*, (1915) 19 C.W.N. 152=28 I. C. 898; *Das Narayan Singh v. Mir Mahamad*, (1921) 6 Pat L.J. 319= 61 I.C. 823.

3. *Imam-un-nissa v. Liakat Hussain*, (1880) 3 All. 424 (426).

4. *Ramessuree Dassie v. Doorga Dass*, (1880) 6 Cal. 103; also *Sahdeo v. Ghasiram*, (1894) 21 Cal. 19 (22).

5. See note (2); also *Malkharjan v. Narahari*, (1901) 25 Bom. 337.

In *Malkarjan v. Narahari*¹ the notice under *Malkarjan v. Narahari.* this rule was properly expressed but it was served on a person who, as it turned out subsequently, was not the proper representative. He objected that he was the representative, but the Court decided against him erroneously against his protest and proceeded with the execution. "In doing so, the Court was exercising its jurisdiction. It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right and if that course is not taken the decision however wrong cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously; acting in its duty to make the estate of Nagoppa available for payment of his debt, it served with notice a person who did not legally represent the estate and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do." Their lordships however said that the omission to serve the notice is a serious irregularity sufficient by itself to enable the plaintiff to vacate the sale but there may be defences to such a proceeding and justice cannot be done unless

those defences are examined by legal methods and held that the sale was only voidable and it was valid until set aside under Or. 21 rule 90 or by independent suit brought within a year as provided by—article 12 clause (a) of the Limitation Act.¹

*Raghunath
Das v.
Sundar Das.*

The decision in *Malkarjun's case* was peculiarly interpreted by the Calcutta High Court. In a case where no notice under this rule had been served on the legal representative their Lordships refused to set aside the sale when the judgment-debtors failed to prove that they have suffered any loss by the sale. They refused to follow the earlier decision,² which said that for want of notice the sale was void and said that in *Mallikarjan's case* the Privy Council held that to justify a Court in setting aside a sale on the ground of omission to serve notice under rule 22, it must be proved that such notice has resulted in substantial injury to the owner of the property sold.³ The view thus taken in Calcutta proceeds on a wrong appreciation of the decision in *Mallikarjun's case* and that it is so was clearly stated by the Judicial Committee in *Raghunath Das v. Sundar Das*. In this case, after the attachment of property the judgment-debtor became insolvent and his estate vested in the official assignee. A notice was served upon him to show cause why he should not be substituted in the suit for the judgment-debtor. The official assignee did not appear. His name was brought on

1. (1901) 25 Bom. 337 (347) on appeal from *Erava v. Sidramappa*, (1897) 21 Bom. 424, explaining *Basvantapa v. Ramu*, (1885) 9 Bom. 86 ; see also *Khizarajmal v. Daim*, (1905) 32 Cal. 296 P.C.

2. *Sahdeo Pandey v. Ghasiram*, (1893) 21 Cal. 19.

3. *Rasaraj Kunai v. Prasanna Kumar Roy*, (1913) 40 Cal. 45, see also *Levinia Ashton v. Madhabmoni Dasi*, (1910) 11 C.L.J. 489 = 5 I.C. 390; *Lakshmicharan v. Sris Chandra Roy*, (1911) 13 C.L.J. 162. ; *Sham Sundar v. Jhumat*, (1911) 20 C.L.J. 337 = 11 I.C. 893.

record and the sale completed in execution proceedings. In a suit by a purchaser at a later sale by the official assignee for possession against the purchaser at court-auction, their Lordships said that the notice calling upon the official assignee to show cause why he should not be substituted for the judgment-debtor was not a proper notice and it ought to have called upon him to show cause why the decree should not be executed against him and referring to *Malkarjun's* case said :

“ Their Lordships’ attention was called in this connection to the case of *Malkarjun v. Narhari*,¹ but in their opinion there is nothing in that case which has any bearing upon the present appeal. As laid down in *Gopal Chunder Chatterje v. Gunamoni Dasi*,² a notice under section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case of *Malkarjun v. Narhari*,¹ such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section, and the respondents had full notice of, and indeed were res-

1. (1900) 25 Bom. 337 P.C.

2. (1892) 20 Cal. 870.

possible for, the irregularities of the procedure adopted."¹

*Shankar
Daji v.
Dattatraya
Vinayak.*

In *Shankar Daji v. Dattatraya Vinayak*,² the decree-holder applied for execution after the death of the judgment-debtor, bringing his brother's widow as legal representative; throughout that time the plaintiff knew that the debtor had bequeathed his estate to his mistress R. There was no inquiry as to who the real representative was, and the widow not appearing, the property was sold and purchased by the plaintiff from the auction-purchaser. In the meantime R obtained probate of the will and in a suit by the plaintiff for possession, it was held that the sale was void against her and in as much as the estate was not properly represented, her right to resist the suit was preserved.

Macleod C.J. said: "An execution-creditor seeking execution against the party can serve notice under rule 22 on a person intermeddling with the estate of the deceased and that would be service on the legal representative. It does not follow that he thereby secures himself against any objection that may be raised in the execution-proceedings which continue after the service of such notice. He is liable to be met with the objection afterwards, either that the person on whom notice was served was not as a matter of fact intermeddling with the estate, or that as a matter of fact there was a true legal representative in existence at the time. It cannot be that execution-proceedings can be good against the true legal representative without notice, merely by ser-

1. (1914) 42 Cal. 72 P.C. on appeal from (1912) 15 I.C. 288; *Shyam Mandal v. Satinath Banerjee*, (1916) 44 Cal. 954; *Kinkar v. Sthiti Ram*, (1918) 27 C.L.J. 528 = 46 I.C. 221.

2. (1921) 45 Bom. 1186.

ving notice upon some one, whom I may call *quasi* legal representative, on the ground that he was intermeddling."

It was considered in Madras that the addition of sub-rule (2) to this rule in the C. P. Code of 1908 made a change in the law and that under the present Code, an omission to issue notice would only be an irregularity.¹ In *Rajagopala Ayyar v. Ramanujachariar*,² the question was referred to the Full Bench, "Whether in a case where notice under Order XXI rule 22, has not been issued and the omission is due not to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, a sale held in execution is void or merely voidable, as against the person to whom notice should have been, but was not issued? The answer was that the sale was *void*." *Rajagopala Ayyar v. Ramanujachariar.*

In *Surendranath v. Bolaram*,³ one of several judgment-debtors died after their properties were duly attached in execution of an *ex parte* decree passed against them. The widow of the deceased judgment-debtor made an application for setting aside the *ex parte* decree, but this was dismissed for default. Thereafter the decree-holder, without making an application to execute the decree against the widow of the deceased judgment-debtor and without serving a notice on her under rule 22, put up the attached properties to sale after due publication of sale processes and they were sold to a stranger to the decree on two *Surendranath v. Bolaram.*

1. *Viswanathan Chetty v. Somasundaram Chetty*, (1922) 45 Mad. 875; *Doraiswami v. Chidambaram*, (1924) 47 Mad. 63; but contra *Ragunathaswamy v. Gopal Rao*, (1921) 41 M.L.J. 547.

2, (1924) 47 Mad. 288 F.B. where all the previous cases are collected.

3. (1918) 27 C. L. J. 528 = 45 I.C. 699.

successive days. An application made by all the judgment-debtors including the widow of the deceased judgment-debtor to set aside the sale was dismissed, and an appeal was preferred to the High Court by the judgment-debtors excepting the widow. It was held that as the widow of the judgment-debtor was not a party to the appeal, the mere fact that the sale might have been capable of being avoided or void against the widow on account of the failure of the Court to issue a notice under rule 22, could not affect the sale as against the other judgment-debtors, more especially when the appeal was preferred only on their behalf and the widow was satisfied with the judgment of the lower Court, and that the interest of her husband was liable to be sold in execution of a decree according to which each of the judgment-debtors was liable to pay the whole decretal amount.

*Mahadeo
Singh v.
Dhobi Singh.*

In *Mahadeo Singh v. Dhobi Singh*,¹ the Patna High Court held that "the object of the rule is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security by the decree-holder's delay in executing his decree; but once the original decree has been put into execution and a notice has been served under rule 22 indicating his intention to proceed to execution, it does not seem that it is contemplated by rule 22 that a fresh notice must be served for every execution application made more than one year after the last order against the judgment-debtor."

*Kaniz Mehdi
v. Rasul Beg.*

In *Kaniz Mehdi Begum v. Rasul Beg*,² it was held by the Judicial Commissioner of Oudh that the omission to issue the notice, in the case of a decree

1. (1923) 2 Pat. 916.

2. (1918) 5 O.L.J. 551=48 I.C. 39.

for sale on a mortgage, did not make the sale void, as in the case of a money decree. It was said, "There is a broad distinction to be drawn between a sale under a mortgage decree and an attachment and sale under a simple money decree. A mortgage decree directs the sale of the particular property described in it and the jurisdiction to sell is derived from the decree itself. On the other hand, a simple money decree confers in itself no jurisdiction to sell any property whatever. A valid attachment is necessary before the Court can acquire such power. If therefore attachment is made without the necessary notice being given to the judgment-debtor to show cause against it, this is sufficient to invalidate the subsequent sale. But in the case of a mortgage decree which expressly directs the sale of the property, the omission to issue notice, unless it can be shown that the judgment-debtors were prejudiced by it, may be no more than an irregularity which might have entitled the judgment-debtors to apply to set aside under section 311 of the Code of 1882."

If there is a subsisting attachment and a sale is made under it on an application made more than a year from the date of the decree, without notice being issued, the sale is not without jurisdiction but merely irregular and liable to be set aside under Order 21, rule 90.¹

Opinion in America is divided on the question whether sales in the absence of levies are only irregular or totally void. The need for levy can arise only in the execution of decree for money, for "in every case in which from the entry of a judgment it follows that specific real property may be sold for

Sale without attachment.

1. *Vuppu Seetharamayya v. Gopalakrishnamma*, (1919) 43 Mad. 57.

its satisfaction and in which the writ issued is either in express terms or in legal effect a special execution authorising the sale of specific real property, either because the judgment expressly directed such sale or because by reason of a pre-existing attachment such property has been impressed with the lien for the satisfaction of the judgment there can be no necessity for any purpose of any levy on such property under the writ of execution.”¹

According to the Allahabad High Court, a regularly perfected attachment is an essential preliminary to sales in execution of simple money decrees and when there has been no such attachment, any sale that may have taken place, is not, simply voidable,² but de facto void and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor.³ In a later case however, the same Court changed its view and said that absence of attachment was no more than a material irregularity in publishing the sale and the sale held without it can be set aside only on proof of substantial injury caused thereby to the judgment-debtor.⁴

According to the High Courts of Calcutta, Patna, Madras and Rangoon, attachment is merely a measure for the protection of the decree-holder and the purchaser of the property and the absence of attachment is not, therefore, an objection which the

1. FREEMAN ON VOID JUDICIAL SALES, S. 104 ; FREEMAN ON EXECUTIONS, S. 280.

2. *Mahadeo v. Bholanath*, (1882) 5 All. 86 F.B.; *Fida Hussain v. Kutub*, (1884) 7 All. 38 ; *Lala Seva Ram v. Kashi Ram*, (1890) P.R. 76.

3. *Ram Chand v. Pitam Mal*, (1888) 10 All. 506.

4. *Sheodhyan v. Bholanath*, (1899) 21 All. 311 ; *Penara Shukul v. Baldeo Sahai*, (1912) 21 I. C. 46.

judgment-debtor is competent to raise, so that a sale in execution of a decree without an attachment made before, is not a nullity.¹ According to the Bombay High Court a sale without an attachment is void ab initio.² A similar view was taken in Calcutta in a later case in 1917.³

It has been thought in Madras that a sale held, in pursuance of an attachment effected during the life-time of the judgment-debtor and after his death, without bringing his legal representative on record is illegal and must be set aside;⁴ *a fortiori* the absence of legal representative throughout execution proceedings in a case where the judgment-debtor is dead or is incapacitated at the date of the attachment must invalidate the sale.⁵

Death of judgment-debtor after attachment.

A contrary view was held by the other High Courts that if a judgment-debtor died after attachment, a sale held without a legal representative on record was not invalid.⁶

1. *Sharoda v. Wooma*, (1867) 8 W.R. 9; *Kishory v. Mahomed*, (1890) 18 Cal. 188; *Tasaduk v. Ahmed*, (1894) 21 Cal. 66 P.C.; *Tincouri v. Shib Chandra*, (1894) 21 Cal. 639; *Sasirama v. Meherban*, (1911) 13 C.L.J. 243=9 I.C. 918; *Taraknath v. Shyamacharan*, (1918) 36 I.C. 292; *Ramasami v. Ramasami*, (1906) 30 Mad. 255; *Adil Khan v. Mirza Mohammad*, (1910) 13 O.C. 43=5 I.C. 798; *Wazir Narain v. Bhikari Ram*, (1922) 2 Pat. 207; *Shankar Rao v. Mawk Rao*, (1923) Nag. 18=68 I. C. 843; *Ma Pwa v. Muhammad Tambi*, (1923) 1 Rang. 533=77 I.C. 368.

2. *Sarabji v. Kala Ragunath*, (1911) 36 Bom. 156.

3. *Panchanan v. Kunja Behari*, (1917) 42 I.C. 259. See also *Raja Thakur Barhma v. Jiban Ram*, (1914) 41 Cal. 590 P.C.

4. *Ramasami v. Bagirathi* (1883) 6 Mad. 180; *Krishnayya v. Unnissa*, (1891) 15 Mad. 399; *Groves v. Administrator-Gnl.*, (1898) 22 Mad. 119.

5. *Narayana v. Kalyanasundaram*, (1895) 19 Mad. 219.

6. *Aba v. Dhondur*, (1895) 19 Bom. 276; *Eruva v. Sidramappa*, (1895) 21 Bom. 424; *Nett Lall v. Sheik*, (1896) 23 Cal. 686; *Sheo Prasad v. Hira Lal*, (1890) 12 All. 440; *Abdur Rahman v. Shankar*, (1895) 17 All. 162; *Maharaj Bahdur Singh v. Jawahir Lal*, (1900)

Change in the law.

This difference of opinion was due to the interpretation of the words "fully executed" in section 234 of the old Code which said that "where a judgment-debtor dies before the decree has been *fully executed* the holder of the decree may apply to the Court which passed it to execute the same against the legal representative." While the Madras High Court thought that a decree was not fully executed until the property was sold, the other High Courts considered that an attachment was equivalent to full execution and that thereafter the property attached was in the hands of the law so that the death of the judgment-debtor did not cause the abatement of the attachment. Under the present Code, section 50 substitutes the words '*fully satisfied*' for the words '*fully executed*' of the old Code and therefore has sanctioned the view taken in Madras, with the result that a sale held after the death of the judgment-debtor and without a legal representative is a nullity.

Sale under O. 21, r. 32.

In the case of a sale of property under Order 21 rule 32, a subsisting attachment and the lapse of a year after attachment are indispensable conditions precedent to sale and a contravention makes the sale void.¹

Sale without notice under O. 21, r. 66.

Omission to give notice of sale under Order 21 rule 66, is more than a mere irregularity and renders the sale void.²

20 A.W.N. 99; *Dulari v. Mohan Singh*, (1881) 3 All. 759; *Stowell v. Ajudhia Nath*, (1884) 6 All. 255; *Peari Lal Singh v. Chandi Charan Singh*, (1907) 11 C.W.N. 163; *Jagadish v. Bama Sundara*, (1919) 23 C.W.N. 608=51 I.C. 972.

1. *Badri Pershad v. Fakira*, (1911) P.L.R. 170=10 I.C. 341.

2. *Ramesserri Dassee v. Durga Dass*, (1881) 6 Cal. 103; *O. R. M. Ramaswamy Chetty v. Ma U Tha*, (1917) 38 I.C. 98.

“ Manifestly the object of the statutory requisite for notice of the time and place of sale is to disseminate the intelligence of the occurrence of the sale so that a better price will be realized, as a spread of the knowledge of the sale produces competition thereat. The purpose of the notice is principally, then, to prevent a sacrifice of the debtor’s property. The notice of sale is almost a universal requisite in judicial and execution sales. In judicial sales the infirmity caused by a defective notice, or the entire omission of the notice, is cured by the subsequent confirmation, though if objection to the confirmation is made in time the court will unquestionably refuse to sanction it because of the defect; and so long as there is a retention of jurisdiction in the court it will entertain a motion to vacate the sale for a want of notice or a radical defect in the same. Or in the exercise of its supervisory power the court may set the sale aside even when no objections are raised upon this ground. If fault cannot be imputed to the purchaser at an execution sale for having participated in occasioning it, the circumstance that there was a failure to publish the notice of sale required by statute will not defeat the sale, according to the great weight of judicial opinion in America. Statutes prescribing notice of sale have generally been construed as of directory import, and a non-compliance therewith but an irregularity which, although amply grave to warrant the court in vacating the sale if moved to that effect in time, cannot affect the rights of innocent purchasers without notice, when assailed in a collateral proceeding. Pursuant to this rule an innocent vendee of the original purchaser having no notice of any irregularity will be protected in any

event, whether relief is sought against him by motion in the original case, or the jurisdiction of equity is invoked to accomplish the same purpose, though where the judgment creditor himself becomes the purchaser his assignee is chargeable with notice, or where the attorney on record of the plaintiff becomes the purchaser he is chargeable with notice of irregularities, whether he has actual notice thereof or not. Even where notice of sale is not considered an indispensable requisite to a valid execution sale, yet, if such irregularity is the result of a fraudulent and collusive scheme concocted by the purchaser himself, or participated in by him, and the property was disposed of for a grossly inadequate price, the vendee and those purchasing from him with notice, as a necessary consequence, hold under an illegal and void sale for fraud which may be vacated by a proper proceeding for that purpose."¹

A sale held at a time before the hour advertised for it is invalid. So it was where property advertised for sale at 11 A. M. was sold at 7 A.M.²

In *Motahar Hossain v. Mahammad Yakub*,³ a sale in execution of a decree was proclaimed to take place on a certain day, but as that day happened to be a holiday, the sale was not held. In the meantime a suit had been filed by the judgment-debtor's sisters claiming the attached property and

1. KLEBER ON VOID SALES, 294-6.

2. *Chedami Lal v. Amir Beg*, (1885) 7 All. 676; *Bash Arutulla v. Uma Charun*, (1889) 16 Cal. 794. See *contra*, *Sit Pwan v. Ngwe Thain*, (1907) 4 L.B.R. 123; *Safdar Ali v. Fazal*, (1915) 30 I.C. 524; *Madho Lal v. Jawahir*, (1910) P.R. 40=6 I.C. 713. See also *Tasadduk v. Ahmed Husain* (1893) 21 Cal. 66 P.C.

3. (1925) 40 C.L.J. 311=84 I. C. 700. See *Hari Sadhan v. Shib Gopal*, (1922) 35 C.L.J. 140=65 I.C. 746.

an application was made in that suit for an injunction restraining the sale. The Court ordered the execution case and the application for injunction to be put upon a certain date, and on that date the application for injunction was refused and the property was sold. On the application by the judgment-debtor to set aside the sale, the provisions of Order 21 rule 69, C. P. Code, with regard to the publication of the sale not having been followed, the sale was held to be a nullity.

The Civil Procedure Code enacts that "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage and he may institute such suit notwithstanding anything contained in Order 2 rule 2."¹ This rule replaced a similar provision of Section 99 of the Transfer of Property Act 1882. In dealing with that section, a sale in contravention of this rule was held to be a nullity,² and the purchaser acquired no title under it, to oust the mortgagor from possession,³ and when he did get possession, he was but a trespasser and bound to account for the profits of the property during the period of his possession.⁴ But in *Ashutosh v. Behari Lal*,⁵ a contrary view was laid down.

Sale contrary to O. 34, r. 14.

1. C. P. C., O. 34, r. 14. Nothing in this sub-rule shall apply to any territories to which T.P. Act, 1882, has not been extended: *Ibid* sub-rule (2).

2. *Vigneswara v. Bapayya*, (1893) 16 Mad. 436; *Sheodeni v. Ram Saran*, (1899) 26 Cal. 164; *Sonu v. Behari*, (1906) 33 Cal. 283.

3. *Basiruddi v. Kailas*, (1906) 33 Cal. 113.

4. *Shibdas v. Kalikumar*, (1903) 30 Cal. 463.

5. (1908) 35 Cal. 61 F. B.

Mookerjee J. said " An irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. The application of this doctrine to an individual case may sometimes be attended with difficulty. But the safer rule to determine what is an irregularity and what is a nullity, is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. When the object of the statute has been determined, if the statutory provision is not based on grounds of public policy and is intended only for the benefit of a particular person or class of persons, the conditions presented by the statute are not considered as indispensable, and may be waived. In this case the provision was one for the benefit of the person entitled to redeem the mortgaged property, and he may at his pleasure waive the right and a sale though held in contravention of this rule is not void but voidable only at the option of the person affected by the irregularity."¹

But the question of setting aside the sale is one relating to execution and arising between the

¹ *Mayan v. Pakuran*, (1899) 22 Mad. 347 ; *Khirajmal v. Daim*, (1905) 32 Cal. 296 P. C.; *Muhammad v. Dilsukh*, (1905) 27 All. 517 ; *Kishan Lal v. Umrao*, (1908) 30 All. 146 ; *Lal Bahadur v. Abharan Singh*, (1915) 37 All. 165 F.B. (no objection can be taken after confirmation) ; *Sahadu v. Devlya* (1912) 14 Bom. L. R. 254=14 I. C. 780 ; *Ramakrishna v. Pushapati Vijayarama*, (1912) 15 I.C. 589 , *Mehr Baksh v. Sanjhe Khan*, (1916) P.R. 18=33 I.C. 802 ; *Bhola Jha v. Kali Prasad* (1916) 1 Pat. L. J. 180=34 I. C. 288 ; *Narayan v. Keshab*, (1918) 28 C. L. J. 151=46 I. C. 493 ; *Ganesh Narayan v. Gopal Vishnu*, (1917) 41 Bom. 357.

parties to the suit wherein the sale took place and the sale must therefore be set aside not by a regular suit but by an application in execution proceeding under Section 47 of C.P. Code.¹ A right to set aside sale in contravention of this rule lasts for three years, after which period it ceases and there is no revival of it after it has once ceased to exist.²

Under Order 21 rule 84, C. P. Code, "On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be resold." According to the Allahabad High Court, by failing to deposit the 25 per cent. immediately the purchaser does not fulfil the indispensable conditions of law required by this rule and the result is that the sale is void *ab initio* and the Court cannot confirm it.³

Failure to deposit 25% on sale.

1. *Mayan v. Pakuran*, (1899) 22 Mad. 347; *Erusappa v. Commercial and Land Mortgage Bank Ltd.*, (1899) 23 Mad. 377; *Muthu v. Karuppan*, (1907) 30 Mad. 313; *Sonu Singh v. Behari*; (1905) 33 Cal. 283; *Ashutosh v. Behari Lal*, (1907) 35 Cal. 61 F. B.; *Gaya Prasad v. Randhir*, (1906) 28 All. 681; *Sailgram Pateria v. Murlidhar Pateria*, (1896) 10 C. P. L. R. 21; *Uttam Chandra v. Raja Krishna*, (1920) 47 Cal. 377.

See also *Baijnath v. Sia Ram*, (1915) 17 C. L. J. 267=18 I. C. 900 F. B.

In *Shao Narain v. Ram Jatan*, (1917) 2 Pat. L. J. 587=41 I. C. 533 a suit to set aside the sale appears to have been conceded. This applies to transferees of money decrees: *Chhagan v. Lakshman*, (1907) 31 Bom. 462; *Sripal Singh v. Gouri Shankar*, (1908) 11 O.C. 231.

2. *Prasad Das v. Jitu Sahu*, (1920) Pat. 259.

3. *Intizam Ali v. Narain Singh*, (1883) 5 All. 316; *Amir Begam v. Bank of Upper India, Ltd.*, (1908) 30 All. 273. [In *Ahmed Baksh v. Lalta Prasad*, (1905) 28 All. 238. a contrary view was taken and it was said that the decision in 5 All. 316 was obsolete

In *Mohamed Ali v. Mahabir Prasad*¹, the Allahabad High Court held that "in a case where a bidder intends to bid for a number of lots and is allowed by the sale-officer to deposit his one-fourth share of the purchase-money as soon as the sales have all been concluded, instead of at the conclusion of the bidding for each particular lot, though the sale-officer is guilty of an irregularity, it is for the judgment-debtor to show that the irregularity was material in that it caused him substantial loss and in the absence of such evidence the sale cannot be set aside."

But according to the other High Courts, the sale is valid, and the failure to deposit the fourth is a mere irregularity which will not be a ground to set the sale aside in the absence of proof of substantial injury.²

A distinction was expressed in *Mahomed Ali Mia v. Kiberia Khatun*³: "There is one ground, however, on which the cases of *Ahmad Baksh v. Lalta*⁴ and *Bhim Singh v. Sarwan Singh*,⁵ can be distinguished. In both the cases, the money was paid though there was delay in payment. The fact that the money was not paid

law] ; *Ali Muhammad v. Ali Khanum*, (1915) 2 O. L. J. 216=30 I. C. 230. See also *Shahzadi v. Ahmad Ali*, (1918) 21 O. C. 212=47 I. C. 993.

1. (1916) 35 I. C. 411.

2. *Bhim v. Sarwan*, (1889) 16 Cal. 33 ; *Venkata v. Sama*, (1891) 14 Mad. 227 ; *Inaitullah v. Punjab National Bank Ltd.*, (1922) 67 I. C. 427 ; *Ramanchetty v. Olagappa*, (1906) 3 L. B. R. 225 ; *Maung Chit Hlaing v. N. A. R. M. Chetty Firm*, (1924) Rang. 81.

3. (1911) 15 C.W.N. 350=9 I.C. 66. See also *Ali Muhammad v. Ali Khanum*, (1915) 2 O. L. J. 216=30 I. C. 230.

4. (1906) 28 All. 238.

5. (1889) 16 Cal. 33.

immediately, but was paid afterwards, may amount to only an irregularity in conducting the sale which can be inquired into only upon an application under sections 311 and 244. But in the present case, it has been found that the money was never paid at all. A Court can have no power to sell a property to a person who does not pay for the property and a sale so held may be treated as no sale at all under the Code."

"If the bidder at an execution or judicial sale bribes or induces another bidder thereat by a promise to pay him a sum of money, or other valuable consideration, or agrees with him to divide the property with him if he refrain from further bidding, and by the employment of such means becomes himself the successful bidder for a sum less than would otherwise have been realized but for such fraudulent acts of the purchaser, such sale is fraudulent and void. No title will be acquired thereby, or by the deed executed in consummation thereof, as against all parties whose rights have been thus infringed upon by such deliberate fraudulent machinations. The owners of the land may recover the same from the purchaser in a proper action instituted for that purpose, and need not, as a prerequisite to the prosecution of such suit, refund the purchase money paid by the fraudulent vendee even if it was used in the discharge of a mortgage or other liens or incumbrances upon the property, or in the satisfaction of the judgment lien upon which the sale is founded. Money expended by him upon the real property involved, or its title, need not be returned before commencing suit for recovery of the same.

Fraud of bidder.

"The prevention of bidding at compulsory sales

is considered as being in derogation of good policy and as having a tendency to the encouragement of fraudulent and unfair dealings, enabling a bidder to gain thereby, but at the same time precluding a possibility of sustaining any loss. The doctrine that such a fraudulent purchaser is not entitled to have his money returned is not enforced in the nature of a punishment, nor upon a desire to aid the defrauded party because of the imposition and in disregard of the principles of equity, but rather upon the rule of law that by his wrongful acts with which the sale is environed, the purchaser has placed himself in a position where the court is powerless to extend its aid in affording him relief. A fraudulent vendee's mouth is closed from asserting that equity is in his favour, and consequently must be denied the protection of the court, for where positive fraud is shown to exist a court of chancery will never reimburse the vendee nor afford him indemnity. Rights are never founded upon fraud, and hence, by reason of his fraud, the purchaser is held to have forfeited all claims to the money he has paid on his bid, or invested in the betterments of the estate, and has acquired no title to the land thus bought."¹

Sale to
incapacitated
persons.

“The law is intolerant of and abhors and condemns fraud. It is a matter of common understanding that incompatible capacities cannot be assumed in the transaction of business without encountering the possibilities of fraud. The individual who sells at a judicial or execution sale is prohibited from buying thereat, directly or indirectly, as it is in derogation of the policy of the law to combine antagonistic interests in one and the same person. The law demands allegiance to the duties of the imposed

1. KLEBER on Void SALES, 322-3.

trust and requires the offices to guard with scrupulous fidelity the interests of beneficiaries and others whose property is involved, by forbidding of these persons from buying at their own sales, because his interests as vendor and vendee would be diametrically opposed. The latitude of the rule is sufficiently extensive to include every one in any manner concerned in selling, or vested with authority to dispose of the property of others by sale, under writs, orders or decrees of court, and is formulated upon the theory that it is violative of the principle of morality for one to assume positions whereby individual interest and honesty are made contending forces. Therefore, the law prohibits such persons from assuming the dual and inconsistent positions of seller and purchaser, and in accordance with this policy sales consummated in violation thereof, are at least voidable if not void, and may be vacated upon timely application.

“ That the sale was fair and honest otherwise is an element of no importance whatever, for it is withal nevertheless void. And if the fiduciary purchases the title or interest prior to the confirmation it falls within the rule and will be considered void. Recognizing the expediency of the general rule, statutes¹ have been enacted expressly declaring that all concerned in the execution of the process of the court or order of sale are incompetent as purchasers at the sale conducted thereunder, and are prohibited from having any private interest therein ; and declaring further that a purchase made in violation of this inhibition shall be void. Such statutes are but declaratory of the universal rule and policy of courts enforced long anterior to their

1. See pages 442-6 *supra*.

enactment, and the policy and statutes alike have their inception in the salutary principle of human conduct and maxim of morality that it is impossible for one person to serve two masters in good faith, when conflicting interests are involved.

“Accordingly, statutes forbidding administrators, executors and guardians from purchasing directly or indirectly at their own sales have been construed as mandatory, and that the term “void” therein employed means void collaterally. Purchases directly by administrators, executors, guardians or other officers of the court, at their own sales are void, not only by reason of the statute or the policy of the law forbidding them, but because of the further reason that in all conveyances there must of necessity be a qualified vendor to grant and a competent vendee to receive the title or estate, and that it is absolutely impossible for these two to be united in one and the same person. Such conveyances must not be confounded with these where the officer buys through an agent who takes the conveyance in his own name for the benefit of the former who is in fact the real purchaser; these latter sales are almost but not quite universally held voidable, but the former may well be considered unconditionally void.”¹

Sale of
property in
scheduled
districts.

A decree passed by a Court to which the Civil Procedure Code applies for sale of property situate in a Scheduled District to which the Code does not extend is a nullity. So, for instance, a decree for sale of property situate within the jurisdiction of the Agency Courts was held to be without jurisdiction.²

1. KLEBER ON VOID SALES, 323-6.

2. *Ramabhadraraju v. Maharaja of Jeypore*, (1919) 42 Mad. 813. See Vol. I, 127.

It is a settled question in our jurisprudence that an execution sale of property exempt under the homestead laws, in defiance of the rights and against the objections of the claimant of the same is unauthorized and void. It is also a rule of law that the sale of personal property exempt by statute is insufficient to divest the owner of the title thereto, if the claim is properly urged as required by law.¹

Sale of
exempted
property.

“A question of paramount importance in sales under execution is that the property or interest of the judgment debtor levied upon and sold, must be such as is subject to the execution under which it is seized, and if not so the entire proceedings are a nullity and will not affect the title in the least degree. Therefore, notwithstanding the general rule that legal estates are subject to sale under execution in suits at law, yet when the naked legal title only, unconnected with any beneficial interest in the property, stands in the name of the judgment debtor, it is not subject to disposition in this manner and if attempted to be sold the transaction is void.”²

In *Dayamayi v. Ananda Mohan Roy*,³ the following questions were referred to the Full Bench in Calcutta

*Dayamayi v.
Ananda
Mohan Roy.*

(i) Whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all.

(ii) If not, whether the holding apart from the right of occupancy can be transferred.

(iii) In either case whether the validity of the transfer can be questioned by any person other than the landlord of the holding.

1. KLEBER ON VOID SALES, 312. See Chapter XVI supra.

2. KLEBER ON VOID SALES, 308.

3. (1914) 42 Cal. 172. All the earlier cases are collected here. See also *Basiram v. Kattyayani*, (1911) 38 Cal. 448.

The Bench of five Judges gave the following answer :—

“ The weight of modern authority establishes the following propositions regarding the transfer for value of occupancy holdings apart from custom or local usage :

1. The transfer of the whole or a part is *operative as against the raiyat*,

(a) where it is made voluntarily,

(b) where it is made voluntarily and the *raiya*t with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made.

2. The transfer is *operative as against the landlord* in all cases in which it is operative against the *raiya*t, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy.

Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case.

3. The transfer of the whole or a part is *operative as against all other persons* where it is operative against the *raiya*t.”

In *Chandra Benode v. Ala Bux*,¹ the question was “Is the sole landlord of a raiyat competent to sell, in execution of a money decree against the raiyat, his occupancy holding, unless the holding is transferable by usage or custom?” and again a special Bench of five Judges discussed the question and said that “the sole landlord of a ryot is competent to sell in execution of a money-decree against the raiyat his occupancy holding, whether the holding be or be not transferable by custom or local usage” and substituted the following proposition: “The transfer of the whole or a part is operative as against the raiyat whether it is made voluntarily or involuntarily” for the first proposition enunciated in *Dayamayi’s* case. The result of the modification was thus stated by the special Bench: “When voluntary and involuntary transfers are placed in the same category so far as the *raiya*t is concerned no difficulty can arise under section 60 of the Civil Procedure Code which makes saleable in execution all property belonging to the judgment-debtor over which he has a disposing power, thus prescribing precisely the same test as was formulated by Mr. Justice Jackson in *Dwaraka Nath Misser v. Hurrish Chunder*,² namely, that the measure of liability to involuntary alienation is the power of voluntary alienation.”

*Chandra
Benode v.
Ala Bux.*

It was therefore held in *Kenaram Pal v. Kinu Mandal*,³ that a non-transferable occupancy holding is liable to be sold at an execution sale at the instance of an ordinary creditor—not a landlord—notwithstanding objections by the ryot.”

1. (1920) 48 Cal. 184, where there is a full discussion of the earlier cases. *Abdul Samad v. Basiruddin*, (1922) 66 I.C. 220.

2. (1879) 4 Cal. 925.

3. (1923) 50 Cal. 508.

But where the Bengal Tenancy Act prevents alienation voluntary or involuntary of an aboriginals' tenure or holding except as provided by Chapter VII A of that Act, a sale held in contravention of the Act was held to be a nullity.¹

It was held in Allahabad that the sale of land, was a nullity, when it was barred by the provisions of the Bundelkand Land Alienation Act, 1903,² and that so was the attachment and sale of an expropriatory tenancy.³

But a judgment-debtor who might have raised objections prior to the sale, but who has refrained from doing so and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable.⁴ That is, "whatever may be the effect of that sale, if the judgment-debtors were parties to that order or were aware of it and did not appeal against it, they are now (after the sale) precluded from questioning the propriety of that order, and consequently of the sale that had taken place under the order".⁵

In *Bholanath v. Mt. Kishori*,⁶ it was held by the Full Bench of Allahabad, that section 60 of the

1. *Joggeswar Mahata v. Jhapal Santal*, (1923) 51 Cal. 224
See also *Annada Mohan Roy v. Gour Mohan Mallik*, (1920) 48 Cal. 536.

2. *Satdhar v. Ramchandra*, (1923) 46 All. 153; See also *Hanuman Prasad v. Harakh Narain*, (1919) 42 All. 142; *Katwar v. Ram Tiwari*, (1921) 43 All. 547.

3. *Khiali Ram v. Bao Zahurullah Khan*, (1905) A.W.N. 153.

4. *Umed v. Jas Ram*, (1907) 29 All. 612; *Ramchiabar v. Bechu Bhagat*, (1885) 7 All. 641; *Lala Ram v. Thakur Prasad*, (1918) 40 All. 680; *Pandurang v. Krishnaji*, (1903) 28 Bom. 125; *Dwaraknath v. Tarini Sankar*, (1907) 34 Cal. 199.

5. *Durga Charan v. Kali Prasanna*, (1899) 26 Cal. 727.

6. (1911) 34 All. 25 F.B. But not in execution of a simple money decree: *Totaram v. Chain Sikkh*, (1888) 8 A.W.N. 154.

C. P. Code does not operate as a bar to the sale of a house belonging to an agriculturist in execution of a decree on a mortgage,¹ of the same if such house is not an appurtenance of the mortgagor's holding which he is prohibited by law from mortgaging or transferring.

In *Rajanikanta v. Shaikh Rahman*,² Mookerjee J. said "It cannot be maintained on principle that because a sale has been held in contravention of a statutory provision, it must, irrespective of the nature and purposes of the provisions, be deemed to be null and void. The only rule that may be adopted is that, when the provisions of a statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature, scope, and object of the provisions which has been violated. No hard and fast rule can be drawn between a nullity and an irregularity. But this much is clear that "an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation or is so essentially defective as to be of no avail or effect whatever or is void and incapable of being validated. One test is well-established and is often useful as was observed by Coleridge J. in

Sale contrary to statute.

1. *Bhola Nath v. Mt. Kishori*, (1911) 34 All. 25. (Banerji J. dissenting); *Bhagwandas v. Hathibhai*, (1879) 4 Bom. 25; *Mubarak v. Ahamad*, (1924) 46 All. 489.

2. (1924) Cal. 408=27 C.W.N. 766.

Reference was made to *Tasadduk v. Ahmad Husain*, (1893) 21 Cal. 66 P.C.; *Govindlal v. Ram Janam*, (1893) 21 Cal. 70 P.C.; *Malkarian v. Narhari*, (1900) 25 Bom. 337 P.C.; *Nusserwanjee v. Meer Mynooddeen* (1855) 6 M.I.A. 134. *Subramania Ayya v. King Emperor*, (1901) 25 Mad. 61 P.C. (where failure to comply with the provisions of a statute completely vitiated the proceedings.)

Holmes v. Russell,¹ it is difficult sometimes to establish between an irregularity and a nullity, but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection. If he can it is an irregularity, if not, a nullity. A provision based on grounds of public policy cannot be waived, but if it is for the benefit of the individual he can."

Sale against
public policy.

Where a compromise decree provided for the sale of endowments of an office in a temple, the compromise was not lawful as opposed to public policy.² A decree for sale of the contingent right of a Hindu reversioner or of any property of which the transfer is prohibited by section 6 of the Transfer of Property Act, 1882 cannot be enforced and the Court of execution can treat it as a nullity.³

Sale of
stranger's
property.

Where property belonging to a stranger is sold as belonging to the judgment-debtor, the title of the real owner is left unaffected. As against him the sale is a nullity and he can sue to recover it at any time within twelve years of his dispossession.⁴

1. 9 Dow. 28.

2. *Lakshmanaswami v. Rangamma*, (1902) 26 Mad. 31. See Vol. I, 127.

3. *Munshi Fayazul v. Muhammad Usman*, (1909) 2 I.C. 865; *Ramasami v. Ramasami*, (1906) 30 Mad. 255. See Vol I. 127.

4. *Jwalasahai v. Masiat*, (1904) 26 All. 346; *Nathu v. Badri-das*, (1883) 5 All. 614; *Ragho Prasad v. Mewalal* (1912) 34 All. 223; *Khiraajmal v. Daim*, (1904) 32 Cal. 296 P.C.; *Kadir Hussain v. Hussain*, (1896) 20 Mad. 118 F B; *Gnanambal v. Parvathi*, (1892) 15 Mad. 477; *Narasimha v. Ramasami*, (1895) 18 Mad. 478; *Venkata v. Subbamma*, (1882) 4 Mad. 178; *Nathoo v. Raja Bijaya*, (1895) 9 C.P.L.R. 113; *Khetsing v. Radha*, (1889) 3 C.P.L.R. 162; *Nisar Ali v. Madhudas*, (1890) 10 A.W.N. 224; *Nito Kalee v. Kripa-nath*, (1862) 8 W.R. 358; *Baswantapa v. Rana*, (1885) 9 Bom. 86; *Saifuddin v. Hansraj*, (1912) P.R. 15=11 I.C. 76; *Parekh v. Bai Vakhat*, (1887) 11 Bom. 119; *Vishnu Keshav v. Ramchandra*, (1887) 11 Bom. 130; *Ahmed v. Maung Shwe*, (1904) 1 L.B.R. 53; *Hajee Goya v. Zaccheus*, (1907) 4 L.B.R. 40.

Where there are two sales in execution of the same property and after the first sale no interest in the property is left for a second sale, there is no need on the part of the first purchaser to seek the cancellation of the second sale within the meaning of Article 12 of the Indian Limitation Act, the title acquired by him being unaffected by the second sale.¹

Pursuant to a universal rule of law a sale of real or personal property under execution upon a judgment at law or under a decree in equity, to a stranger to the proceedings who purchased in good faith and without notice, prior to a reversal on appeal of such judgment or decree for error, is valid and the purchaser's title is unaffected by the subsequent reversal. Hence it is a general rule that titles derived from sales consummated under the authority of irregular or erroneous judgments or decrees are not impaired or affected by a subsequent reversal where no *supersedeas* bond is given to stay all proceedings pending the appeal, and when the purchase is made by a third person who bought in good faith without notice and for value. Under no considerations however can this rule be extended to sales under judgments affected with an inherent jurisdictional infirmity, for in such case the title to the property ostensibly sold falls to the ground with the judgment, be the purchaser a stranger or not, *bona fide* and in good faith or not. In any event the validity of a *bona fide* sale to a stranger to the record under judgment reversed for error or irregularity is dependent upon the fact that the sale is made before the reversal. But

Sale after
reversal of
decree.

1. *Motilal v. Karrabuddin*, (1897) 25 Cal. 179 P. C. (Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference.)

where there is a reversal for want of jurisdiction, the fact that third parties have purchased under the belief that the judgment is valid and binding between the parties, is a matter of inconsequential moment, for this will not defeat the right of showing the want of jurisdiction. The rule that a subsequent reversal of the judgment has no effect upon the title of a purchaser under execution or decree has no application to a case where the judgment-creditor himself becomes the purchaser, nor a purchase made by the plaintiff's attorney of record in the cause. These purchasers with notice of the infirmity are not regarded as purchasers in good faith, being bound to know that the proceedings are illegal, and can not hold the property upon a reversal of the judgment.¹

By section 316, C. P. Code, 1882, where the sale of immoveable property became absolute, the Court shall grant a certificate "*provided that the decree under which the sale took place was still subsisting at that date.*" It was therefore held that where the decree was reversed in appeal subsequently to the sale but before the order of confirmation of the sale, the Court which made the decree ceased to have jurisdiction to take any further steps and the confirmation was without jurisdiction, whether the Court and the purchaser were or were not informed at the time of the confirmation of the sale that the decree had been reversed.² This proviso is omitted in the C. P. Code

1. KLEBER ON VOID SALES, 183-5.

2. *Basappa v. Dandayya*, (1878) 2 Bom. 540; *Mulchand v. Muktaprasad*, (1887) 10 All. 83; *Ram Sukh v. Ram Sahai*, (1907) 27 All. 591; *Mahomed Hussein v. Kokil Singh*, (1881) 7 Cal. 91; *Subbayya v. Yellamma*, (1885) 9 Mad. 130; *Doyamoyi v. Sarat Chunder*, (1898) 25 Cal. 175.

of 1908, so that it is no longer necessary for confirmation of sale that the decree should be subsisting at that date.

Where the decree or order under which execution took place and sale was held is set aside or reversed by the same Court or on appeal, the sale cannot stand, if the decree-holder is the purchaser.¹ So it will be, where the purchaser is a party to the suit, though not the decree-holder. Where in execution of an ex-parte decree on a mortgage, the second defendant, a subsequent mortgagee became the purchaser, the sale must be set aside, when the ex-parte decree was reversed on appeal, for the protection given to a bona fide purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree.²

Protection to
strangers.

But if the purchaser is a stranger, the sale once held holds good and the purchaser cannot be disturbed,³ and it will be so if after the decree-

1. *Jan Ali v. Jan Ali*, (1868) 1 B.L.R. 56; *Mina Kumari v. Jagat Sattani*, (1883) 10 Cal. 220; *Mukhoda Dassi v. Gopal Chunder*, (1899) 26 Cal. 739; *Set Umedmal v. Srinath Roy*, (1900) 27 Cal. 810; *Chandan Singh v. Ramdeni Singh*, (1904) 31 Cal. 499; *Shival v. Shambhu Prasad*, (1905) 29 Bom. 435; *Sobhanadri Apparao v. Govindaraju*, (1915) 2 L.W. 1066=31 I.C. 305. See also *Janakdhari Lal v. Gossain Lal*, (1909) 37 Cal. 107; *Hazari Mull v. Janaki Prasad*, (1900) 6 C.L.J. 92; *Paresh Nath v. Hari Charan*, (1911) 38 Cal. 622; *Piari Lal v. Hanifunnissa*, (1916) 38 All. 240; *Shivbai v. Yesoo*, (1919) 43 Bom. 235; *Chintaman v. Chuni Sahu*, (1916) 1 Pat. L.J. 43=34 I.C. 747.

2. *Official Receiver, Madura v. Chettiappa Chetti*, (1925) 48 Mad. 767.

3. *Jan Ali v. Jan Ali Chowdhry*, (1868) 10 W.R. 151; *Murari Singh v. Prayag Singh*, (1885) 11 Cal. 362; *Maung Aung Ban v. Maung Shwe Pe*, (1900) 1 L.B.R. 22; *Zainulabdin v. Muhammad Asghar Ali*, (1887) 10 All. 166 P.C.; *Syed Nathadu v. Nallu Mudaly*, (1903) 27 Mad. 98; *Janukdharilal v. Gossain Lal*, (1909) 37 Cal. 107; *Ram Khelwan v. Asgar Ali*, (1917) 36 I.C. 681; *Krishnachandra v. Jogendra Narain*, (1915) 20 C.L.J. 469=27

holder purchased the property, he resold it to a stranger for value and in good faith.¹

Where the Court of execution had no inherent jurisdiction, and the sale is void on account of a defect of jurisdiction, the purchaser, innocent as he is, gets no protection.²

I.C. 139 (where the authorities are collected) ; *Satischandra v. Rameswari Dasi*, (1915) 22 C.L.J. 409=31 I.C. 894. See also *Parasurama Ayyar, v. Seshier* (1903) 27 Mad. 504.

1. *Marrimuthu v. Subbaraya*, (1903) 13 M.L.J. 231 ; *Sheik Ismail v. Rajab Rowther*, (1907) 30 Mad. 295.

2. *Maharajah of Jeypore v. Raja Laksaminarasimma*, (1924) Mad. 144=15 L. W. 747.

CHAPTER XXII

Redemption of Sales

Annulment of sales—Statutes of redemption—Redemption of sales in India—Rule of construction—Application of the rule—Who can apply—Change in the law—Co-heirs, trespassers etc.—Alienees from judgment-debtor—Difference of views—Forum of application—Form of application—Date of deposit—Extension of time—Amount of deposit—Five per cent—Deposit must be unconditional—No claim to rateable distribution—Bar to application—Parties—Appeal—Formalities may be dispensed with by consent—Refund and contribution.

A sale in execution may be set aside by redemption, that is, by payment of the amount of the decree and expenses, or on an adjudication that the sale was void or voidable on account of fraud or irregularity. The proceedings may be taken by application in the Court of execution, or by suit when a suit is not barred by any provisions of the C. P. Code. A sale can be set aside by redemption under Order 21, rule 89 of the C. P. Code or by application under Order 21 rule 90 or 91 or under section 47 or 151 C. P. Code. As a general rule void sales can be set aside by suit and voidable by application to the Court of execution.

Annulment
of sales.

“ Statutes permitting the redemption of property from execution sales are partly for the benefit of the defendant, and partly for the benefit of persons holding liens against the property acquired from the defendant, but existing in subordination to the execution sale. This right of redemption, no matter in whose behalf or for what purpose invoked, is the creature of the statute. The statute creates the right, prescribes the time and method of its exercise, and designates the persons entitled to exer-

cise it. A person seeking to redeem must, therefore, comply with the statute in every respect. A partial compliance is of no effect. If a redemption has been attempted, the purchaser's rights are not impaired, nor is anything gained by the redemptioner, unless a full compliance with the terms of the statute can be shown. The right is not an equitable right, or, more accurately speaking, is not a right created by courts of equity, and they have, therefore, no power to declare the circumstances upon or the time within which it may be exercised. He who seeks to redeem from an execution sale must do so within the time specified by the statute. He must also be one of the persons to whom the right is there given, and, unless the purchaser exonerates him from doing so, he must comply with every condition prescribed by the statute. Otherwise what he does cannot amount to a redemption. Where, however, the person to whom redemption is to be made denies the right to redeem under any circumstances and gives the debtor or other person seeking to redeem to understand that his right to do so will not, under any circumstances, be conceded, it is not necessary to do the vain act of complying with the different conditions prescribed by the statute, and compliance therewith must be regarded as waived for the purpose of sustaining a suit to enforce the right of redemption. If a debtor's right of redemption has terminated, but one of his creditors is entitled to exercise this right, and does so, the judgment-debtor is not permitted to take advantage of, or otherwise urge, mere irregularities in effecting the redemption, if the purchaser has accepted the redemption money.¹

1. FREEMAN ON EXECUTIONS, III. 1845-7.

Under the C. P. Code, 1908.

Redemption
of sales in
India.

(1) "Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."¹

The object of this rule is mainly to prevent, as far as possible, sale of immovable property at Court sales at inadequate prices.² It confers a special right on the judgment-debtor and he must therefore strictly comply with its terms, before he can

Rule of
construction.

1. C.P.C., O. 21, r. 89 (=Old Code. s. 310 A.)

2. *Pandurang v. Govinda*, (1916) 40 Bom. 557.

claim the benefit under it.¹ But the provisions of the rule give the last chance to the judgment-debtor to save his property and must therefore receive a liberal construction.²

Application of
the rule.

This rule applies to sales held under decrees passed in terms of awards,³ decrees on mortgages and to sales on the original side of the Calcutta High Court.⁴

Under the C. P. Code of 1882, the liberty of getting a sale set aside on depositing the purchase-money was according to the High Court of Calcutta⁵ confined to sales in execution under the Code and did not extend to sales of mortgaged property under the Transfer of Property Act, but according to other High Courts⁶ it was not so limited. The provisions of the Transfer of Property Act relating to mortgage suits have been transferred to Order 34 of the Code of Civil Procedure and it follows therefore that the conflict of views can no longer exist and a mortgagor judgment-debtor can avail himself of the benefit of this rule.

1. *Kalinga v. Narasimha*, (1911) 21 M. L. J. 631=9 I. C. 937; *Manaji v. Agamita*, (1922) 46 Bom. 171; *Fazur Rab v. Mawzar Ahmed*, (1918) 40 All. 425; *Narayan v. Ramkrishnaji*, (1924) 78 I. C. 705.

2. *Kandasami v. Swarnavelu*, (1919) 10 L. W. 556=58 I. C. 958.

3. *Nirode Nath v. Amulya Dhone*, (1923) 27 C.W.N. 466=77 I.C. 774.

4. *Virjibhun Das v. Beseswar Das*, (1921) 48 Cal. 69. But see *Surendra Kristo v. Gur Prasad*, (1921) 24 C.W.N. 536=59 I.C. 432.

5. *Kedar Nath v. Kalichurn*, (1898) 25 Cal. 703 F. B. (overruling (1895) 23 Cal. 682).

6. *Rajaram v. Chunni Lal*, (1897) 19 All. 205; *Krishnaji v. Mahadev*, (190) 25 Bom. 104; *Tirumalrao v. Syed Dastigir*, (1898) 22 Mad. 286; *Mallikarjunudu v. Lingamurti*, (1900) 25 Mad. 244. See also *Shiam v. Bashiruddin*, (1906) 28 All. 778.

The rule does not apply to sales held under the Public Demands Recovery Act,¹ or to sales held for the realisation of partnership-assets.²

The superstructure of a house is immoveable property within the meaning of this rule and when such superstructure is sold, the judgment-debtor is entitled to deposit the decree amount under this rule to set aside the sale.³ A simple hypothecation bond is moveable property only and this rule will not apply to its sale.⁴

Under the Code of 1882, any person *whose immoveable property has been sold* under this chapter might apply. This expression was held to denote any person though not a party to the suit or the decree, whose interests were affected by the sale.⁵ Who can apply.

It was held that the following could apply: A benamidar of a person whose immoveable property was sold,⁶ the purchaser of a share of an occupancy holding transferable by custom,⁷ a donee under a gift pending attachment,⁸ a dar-mokararidar where the mokarari tenure was sold for arrears of rent,⁹

1. *Bepin Behari v. Shashi Bhushan*, (1914) 18 C.W.N. 766 = 22 I.C. 95.

2. *Tuljaram Rao v. Ramachandra Rao*, (1921) 41 M.L.J. 465 = 68 I.C. 916.

3. *Mumtaz v. Abbas*, (1899) 3 O.C. 236.

4. *Umrao Singh v. Lal Singh*, (1924) 5 L.R. All. 674; *Tarvadi Bholanath v. Bai Kashi* (1902) 26 Bom. 305.

5. *Suchand v. Balaram*, (1910) 38 Cal. 1 (6); *Erode Manikkoth v. Puthiedeth*, (1902) 26 Mad. 365.

6. *Basi v. Ram Krishna*, (1896) 1 C.W.N. 135 (doubted in *Paresh Nath v. Nabogopal*, (1901) 29 Cal. 1 (16)).

7. *Benodini v. Peary Mohan*, (1903) 8 C.W.N. 55; *Kunj Behari v. Sambhuchandra*, (1903) 8 C.W.N. 232.

8. *Narain v. Saurindra*, (1904) 32 Cal. 107; *Saratchandra v. Moti Lal*, (1919) 23 C.W.N. 597 = 52 I.C. 251.

9. *ibid.*

a beneficial owner,¹ an under-tenure holder,² a purchaser subsequent to attachment and prior to sale,³ a simple mortgagee of a tenure or holding sold for arrears of rent such sale being with right of purchaser to encumbrances,⁴ and a mortgagee who was affected by the sale.⁵ But when the mortgagee causes the sale, he cannot apply under this rule, as he causes the property to be sold either free from mortgage or subject to his mortgage and in either case he has no interest in the property sold.⁶

An application by a person entitled jointly with a person not entitled was allowed and the payment made by them jointly was received as sufficient,⁷ and so does an application by a share-holder in a moka-rari to deposit the purchase-money in respect of a portion of the moka-rari sold in execution of such a decree fall under Order 21 rule 89.⁸

1. *Baburam v. Ramsahai*, (1905) 8 C.L.J. 305.

2. *Chandra Kumar v. Kamini Kumar*, (1907) 11 C.W.N. 742 ; *Sarat Chandra v. Motilal*, (1919) 52 I.C. 237 ; also *Narain v. Saurindra*, (1904) 32 Cal. 107.

3. *Mulchand v. Govind*, (1906) 30 Bom. 575 ; *Sheikh v. Mathura*, (1905) 8 O.C. 189 ; *Gosta Behari v. Sankarnath*, (1916) 26 C.L.J. 127=36 I.C. 510 ; *Fakran v. Rajab Ali*, (1915) 13 A.L.J. 401=28 I.C. 948.

4. *Paresh Nath v. Nobogopal*, (1901) 29 Cal. 1 (overruling *Nityaranda v. Hiralal*, (1900) 5 C.W.N. 63). See also *Mahadeo v. Vasudev*, (1898) 23 Bom. 181 ; *Safar Ali v. Raj Mohun*, (1902) 1 C.L.J. 454.

5. *Srinivasa v. Ayyathorai*, (1897) 21 Mad. 416 ; *Thakur v. Gurdit*, (1911) P.W.R. 17=12 I.C. 733 ; *Jognarain v. Badridas*, (1912) 16 C.L.J. 156=13 I.C. 144 ; *Kashmiri v. Hatim Ali*, (1915) 13 A.L.J. 273=27 I.C. 831 ; *Aulad Ali v. Abdul Hamid*, (1923) 2 Pat. 715 ; *Jagmohan Singh v. Bachcha*, (1922) 25 O.C. 78=66 I.C. 929 ; *Jagannath v. Jagjiwan*, (1925) 12 O.L.J. 289 (prior mortgagee) ; *BeniMadho v. Sarwar Dat*, (1921) 20 A.L.J. 42=64 I.C. 918 ; *Kandasami v. Swarnavelu*, (1919) 10 L.W. 556=53 I.C. 958 (even though property is sold subject to his mortgage).

6. *Muhammad Ahmadulla v. Ahmed Said*, (1911) 33 All. 481.

7. *Abid v. Diljan*, (1902) 29 Cal. 459.

8. *Raziuddin v. Bindeshri Prasad*, (1916) 36 I.C. 769.

It was held that the following persons could not apply: An attaching creditor,¹ a donee prior to attachment,² a person who contracted to purchase the land sold,³ a purchaser prior to sale in execution of decree against vendor and whose claim was disallowed,⁴ a person who claims a share in immoveable property, which has been sold in execution of a decree against his co-sharers under the Mahomedan Law,⁵ and a mortgagee of a non-transferable occupancy holding.⁶

Under the present Code "any person either owning such property⁷ or holding an interest therein by virtue of a title acquired before such sale may apply." This rule does not say that no application shall be entertained unless it discloses the nature of the applicant's interest. If the interest is not disclosed the Court cannot dismiss the application, but should direct the applicant to furnish the particulars.⁸

Change in the law.

Ordinarily what is sold by the Court and what passes under the sale is only the interest of the judgment-debtor, whatever it is, in the property

1. *Kedar Nath v. Umacharan*, (1900) 6 C.W.N. 57; *Matungini v. Monmotha Nath*, (1900) 4 C.W.N. 542; *Fakhran v. Rajab Ali*, (1915) 13 A.L.J. 401 = 28 I.C. 948.

2. *Erode Manikkoth v. Puthieth*, (1902) 26 Mad. 365.

3. *Mahadeo v. Vasudev*, (1898) 23 Bom. 181; *Arumalla China Subba Reddi v. Vasireddi Jayaramayya*, (1923) 17 L.W. 680.

4. *Ramachandra v. Rakhmabai*, (1898) 23 Bom. 450; *Arjun v. Jadunath*, (1902) 7 C.W.N. 243. But see *Mulchand v. Govind*, (1906) 30 Bom. 575.

5. *Abdul Rahman v. Mahijar*, (1902) 30 Cal. 425.

6. *Denonath v. Kalikumar*, (1915) 29 I.C. 916; *Nalini Behari v. Fulman*, (1912) 16 C.W.N. 421 = 13 I.C. 487; *Abdul Rahman v. Promode Behari* (1915) 20 C.W.N. 40 = 28 I.C. 182. See *Bishun Dayal v. Jagdish*, (1924) Pat. 513 = 30 I.C. 823.

7. *Dalchand v. Bank of Upper India*, (1925) 12 O.L.J. 101 = 86 I.C. 732.

8. *Vittal Singh v. Agarchand*, (1924) 79 I.C. 903.

sold.¹ The word 'sold' in this rule may refer not to what can, in law, be sold and passes but what in fact purports to be sold, for the Select Committee says "words have been added so as to make it clear that a purchaser acquiring a title before the sale in execution can claim the benefit of the sale."

Co-heirs,
trespassers
etc.

A donee subsequent to attachment, a co-heir or a co-sharer will now be persons holding an interest therein and may therefore apply;² so may also a reversioner.³ But a person who is out of possession of the property and who is litigating to establish his title to it cannot.⁴ A trespasser who enters into possession of the property sold, before the sale, has an interest in it and can apply.⁵ A person whose title cannot be affected by the sale cannot apply.⁶

Alienees from
judgment-
debtor.

A judgment-debtor may have transferred his interest before or after the sale. In the former case the transferee can apply by deposit, to have the sale set aside. In the latter case the opinion has been divided.⁷

1. See *Ramchandra v. Rakhmabai*, (1898) 23 Bom. 450. See Chapter on AUCTION-PURCHASER *post*.

2. *Tulsi Ram v. Izzat Ali*, (1908) 30 All. 192; *Moulvi Saijid v. Bendeshri*, (1916) 36 I.C. 769. See *Abdul v. Mateyar*, (1903) 30 Cal. 475 under the old Law.

3. *Brij Kishore v. Pratap*, (1919) 4 Pat. L.J. 360=51 I.C. 359 (*Quere*, whether persons entitled to specific performance or licensees are entitled); *Pankhabati v. Nonihal*, (1913) 19 C.L.J. 72=21 I.C. 207.

4. *Nand Kishore v. Parao Mian*, (1917) 39 All. 700.

5. *Polti Nayaker v. Suppammal*, (1924) Mad. 723=79 I.C. 874 (Oldfield J. dissenting).

6. *Dulhin Mathura Koer v. Bounidher Singh*, (1910) 16 C. W. N. 904=10 I.C. 880.

7. For a conflict of views under the old Code, see *Srinivasa v. Ayyathorai*, (1897) 21 Mad. 416; *Appayya v. Kunhati Beari*, (1907) 20 Mad. 214; *Ramchandra v. Rakhmabai*, (1898) 23 Bom. 450; *Mulchand v. Govind*, (1907) 30 Bom. 575; *Kallar Singh v. Moril Mahton*, (1895) 1 C.W.N. 24. The conflict is summed up in *Sundaram v. Mansa Mavuthar*, (1921) 44 Mad. 554 F.B.

According to the High Court of Allahabad¹ *neither the judgment-debtor who has alienated his property, nor his alienee is entitled to apply under this rule.* Tudball J. said that the rule is a special indulgence to a judgment-debtor or any person holding an interest in the property at the date of the sale, and gives them a last chance of saving the property for themselves: "It was never intended that the property should be saved for persons to whom the property might be sold privately after the auction sale had taken place. The language of the rule clearly shuts out all persons who purchase or acquire an interest *after the auction-sale*. It seems that the legislature had clearly in mind the case of a purchase at a private sale from the judgment-debtor after the sale in execution, in respect of whose right to apply under section 310 of the old Code there were conflicting decisions.² The person making the application is no doubt the judgment-debtor but the person who will benefit by it is the person who has acquired the ownership (or at least an interest in the property), subsequently to the sale in execution, the very person whom the law now in clear terms precludes from making an application". Chamier J. added, "The words 'owning such property or holding an interest therein' evidently refer only to persons who own the property or hold an interest therein at the date of the application and whether the applicant be the owner of or only the holder of an interest in the property, he must show that he acquired his title before the execution sale.

1. *Ishar Das v. Asaf Ali*, (1911) 34 All. 186; *Debi Prasad v. Muhammad*, (1911) 14 O.C. 33=9 I.C. 745; *Mahabir Prasad v. Ganga Dehal*, (1920) 42 AH. 7.

2. *Hazari v. Badai*, (1897) 1 C.W.N. 279; *Appayya v. Karahali* (1906) 30 Mad. 214.

Neither the owner nor the holder of an interest who has parted with his title since the sale or who has acquired title since the sale can apply under rule 89."

Bombay.

The High Court of Bombay said that *the judgment-debtor who sold away his property can apply but that his purchaser cannot*. Batchelor J. said "Under Order 21, rule 89 an application such as this can be made by any person either owning the property or holding an interest therein by virtue of a title acquired before the court-sale. It is not pretended that the judgment-debtor can come in as a person holding an interest acquired before the court-sale, but it is claimed that he can apply as being in the eye of the law the person owning this property. Now the words which I have quoted from rule 89 differ from the words in which in the Code of 1882 the corresponding enactment was phrased. For there, under section 310 A of the Act, a section which was introduced by the amending Act V of 1894, such an application as this could be made by 'any person whose immoveable property has been sold under this chapter.' No doubt at first sight it would appear that the generality of the words of section 310 A has been cut down and restricted by the phraseology of the present Rule 89. But it appears to me that alteration of language effected by the present Rule is sufficiently explained by reference to the conflict which there previously was as to the position of a purchaser acquiring title before the auction sale. In *Srinivasa Ayyangar v. Ayyathorai Pillai*,¹ for instance, it was held that such a purchaser could apply, whereas the contrary view was adopted in *Ramachandra v. Rakhmabai*.² I

1. (1897) 21 Mad. 416.

2. (1898) 23 Bom. 450.

think, therefore, that the change brought about by Rule 89 may be understood as embodying the desire of the Legislature to make it clear that a purchaser acquiring title before the auction sale was competent to apply under this provision of the law.' The learned judge dissented so far from the view taken to the contrary at Madras but agreed with the view taken in Allahabad only about the incompetency of the purchaser to apply. In finding that the judgment-debtor could apply, he added "For, as I understand these provisions of the law, their object is not merely or not specifically to preserve the immoveable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immoveable properties shall not at court-sales be sold at inadequate prices. If that is an important consideration, then it follows that in such a case as this it is no answer to the judgment-debtor to say that even if his application be granted, the immoveable property will still be lost to him. The reply would be that the loss of the immoveable property is now inevitable, but that the Court will be realizing the intentions of the Legislature if it construes these provisions so as to ensure that the monetary loss accruing to the judgment-debtor be as little as possible. For myself I can see no serious difficulty in holding that for the purposes of the rule the judgment-debtor in the position of the present applicant is still the owner of the property in the eye of the law, the auction sale being still unconfirmed. That position must, I think, be held either by him or by the subsequent vendee, and in my view it clearly does not belong to the subsequent vendee, because he has not acquired any title, until the auction sale has been set aside. The case does

not, I think, essentially differ from the case where there is nothing between the judgment-debtor and the third party except an agreement that the third party will purchase at a higher value if the judgment-debtor can succeed in getting the auction sale set aside, and in that case it appears to me clear that the judgment-debtor would be entitled to come in under Rule 89. I do not think that he is in any materially worse position because there has passed between him and the stranger a conveyance which confessedly is not and cannot be operative inasmuch as the auction sale is still subsisting."¹

Other High
Courts.

The view taken in Bombay was adopted by the High Courts of Patna² and Calcutta³ and latterly of Madras also.

Formerly too, in Madras, it was thought that where a judgment-debtor had not legally parted with his interest at the date of the application, it would not affect the application, if he parted with it after that date, though before the final order was passed on that application. Where a judgment-debtor applied under Order 21, rule 89 of the Civil Procedure Code, to set aside a sale of certain lands held in execution of a decree and it appeared that he had previous to his application executed a sale deed therefor which was not however registered, and that he had subsequent to his application executed a fresh sale-deed in respect of the same lands to the same vendee which was registered before a final order was passed on the application, and the auction-purchaser objected to the competency of

1. *Pandurang v. Govinda*, (1916) 40 Bom. 557.

2. *Mt. Dhanwanti Kuer v. Sheo Shanker*, (1919) 4 Pat.L.J. 340=52 I.C. 873; *Lakshminarain v. Kali Prosanno*, (1919) 52 I.C. 314.

3. *Sarada Kripa Lal v. Harendra Lal*, (1922) 49 Cal. 454.

the judgment-debtor to make or sustain the application, it was held that the judgment-debtor had locus-standi to make the application, as he had not ceased to be owner of the lands at the time of his making the application and that he did not lose the right to sustain the application by the subsequent execution and registration of a sale-deed, as it is a well-recognized rule of law that the rights of the parties should be adjudicated as on the date of suit or application and not with reference to what transpires subsequently.¹ But latterly in answer to the question, "Where the owner of immoveable property sold in execution of a decree, sells the property to another subsequent to court sale, does the right to apply under Order 21 sale 89, to have the sale set aside lie with him or with his vendee?" the Full Bench said that the vendee could not apply but the judgment-debtor could.² So it was held that a mortgagee of the property sold after the court-sale had no interest sufficient to apply to set aside the sale.³

It would follow therefore that, *except in Allahabad*, if a judgment-debtor chooses to pass the property to a third person and take away the benefit of the sale from the auction-purchaser, whether with monetary gain to himself or not, by completing the transfer or by contracting to transfer the property, he can do it and in the latter case

1. *Seetharamasami v. Syed Mir*, (1918) 42 Mad. 503.

2. *Sundaram v. Mause Mavathar*, (1921) 44 Mad. 554 F.B. overruling *Subbarayudu v. Lakshminarasamma*, (1915) 38 Mad. 775 and *Ananta Lakshmi v. Sankaran Nair*, (1913) 24 M.L.J. 205 = 18 I.C. 579, also *Gantasola Jagannadhan v. Thathavarthi Ramabrahmam*, (1920) 54 I.C. 753.

3. *Gopalakrishna v. Visvanatha*, (1918) 39 M.L.J. 84 = 58 I.C. 856 F.B.

the deed may be completed after the deposit and the cancellation of the sale ; the only restriction the law makes is that the application and deposit must be made by the *judgment-debtor* only.

Forum of
application.

The word " Court " as used in this rule 89 and rule 92 means the Civil Court and not in the case of a decree being transferred to the Collector for execution, the Collector. In execution of a simple money decree against him, certain non-ancestral zamindari property of the judgment-debtor was sold by the Collector on behalf of the Civil Court. The sale was held on the 20th September, 1916. The Civil Courts, being closed on account of the long vacation in October, 1916, the applicant made an application to the Collector for leave to deposit the sum necessary for getting the sale set aside under Order 21, rule 89, and on such leave being granted, deposited the requisite amount in the treasury on the 16th October, 1916. On the 11th of November, 1916, the day on which the Civil Courts re-opened, he applied to the Munsif under rule 89, and stated that he had already deposited the money in the treasury. The Collector also sent an intimation of the said deposit to the Civil Court and asked for further instructions. In December, the Munsif directed the Collector to transfer the said amount to the Civil Court account in the treasury. The auction-purchaser opposed the application of the judgment-debtor on the ground that as the money had not been deposited in Court along with the application, the application could not be allowed. The objection was upheld.¹

1. *Fazal v. Manzur*, (1918) 40 All. 425 ; *Pita v. Chunilal*, (1906) 31 Bom. 207 ; *Tipangavda v. Raman Gauda*, (1920) 44 Bom. 50.

An application to set aside a sale under this rule may be oral or written,¹ but without an application, the sale cannot be set aside.² A mere deposit of money without an application is not a compliance with the rule³. It was held in some cases that a separate and formal application for setting aside the sale was not essential and the chellan by which the amount was deposited with the leave of Court which set out the purpose of the deposit might be regarded as a sufficient application;⁴ and when once the deposit has been made in time the Court must set aside the sale, though there is no prayer in express terms to do it or though the petition was presented later on.⁵ A deposit by a person, not the attorney or vakil of the person interested is not valid.⁶ But when the application has been made by the vakil, deposit by the vakil's clerk is sufficient.⁷

Where a petition is presented stating that the money has been paid into the treasury and that the

1. *Popoonu Venkata Narasimha v. Jayanti Lakshminarasimham*, (1916) 3 L. W. 174=32 I. C. 783.

2. *Mathura Prasad v. Ram Lal*, (1911) 9 I. C. 33; *Sarvoi Begam v. Haider Shah*, (1912) 9 A. L. J. 12=13 I. C. 406; *Raoji Babu Rao v. Bansi Lal*, (1919) 43 Bom. 735; *Rayapathy Venkatsubbarao v. Narayana Rao*, (1922) Mad. 83=66 I. C. 44; *Ram Autar v. Sheo Piary Lal*, (1935) Oudh 411.

3. *Mariappa v. Harihara*, (1914) 14 M. L. T. 534=22 I. C. 291; *Sarbi Begam v. Haider Shah*, (1912) 9 A. L. J. 12=13 I. C. 404; *Sawan v. Jafar* (1912) P. R. 39=13 I. C. 405.

4. *Abdool Lateef v. Jadub Chandra Kondaji*, (1897) 25 Cal. 216; *Mathuji v. Kondaji*, (1905) 7 Bom. L. R. 263; *Ramrai v. Rabi Prasad*, (1921) 63 I. C. 140; *Ram Sivendra v. Awadh Bihary*, (1923) 4 P. L. T. 295=68 I. C. 629.

5. *Hanooman v. Luchman*, (1904) 8 C. W. N. 355.

6. *Sarvoi Begam v. Haider Shah*, (1912) 9 A. L. J. 12=13 I. C. 454.

7. *Thimmaraju Venkata Kutumbarao v. Venkatappa*, (1924) 46 M. L. J. 119=77 I. C. 765.

object of the petition was to have the sale set aside, the Court can allow the petitioner to amend the petition by adding a formal prayer. But the High Court will not in the exercise of its revisional jurisdiction allow a memorandum filed under the Civil Rules of Practice to notify a payment, to be stamped as a petition or to be amended by containing a prayer to set aside the sale, under Order 21 rule 89 nearly fifteen months after the application is barred.¹

Date of
deposit.

Under this rule "any person either owning such property or holding an interest therein by virtue of a title acquired before any such sale may apply to have the sale set aside on his depositing in Court" An application to set aside a sale must, under Art. 166 of schedule II of the Limitation Act be made within *thirty days* of the date of the sale and this date is the date on which the property is knocked down to the highest bidder and not the date on which the sale is confirmed.² The deposit *as well as the* application must be made within the time thus limited and if either the deposit or the application is out of time, there is no compliance with the rule.³ The deposit and the application may be made

1. *Parat Veethil Seethi v. Ambalatu Veethil Kolathur Ahmed* (1916) 2 L. W. 665=32 I. C. 45.

2. *Choudhary Kesri v. Giani Roy*, (1902) 29 Cal. 626; *Munshi Lal v. Ram Narain*, (1912) 35 All. 65; *Haji Charan v. Haridas*, (1902) 2 C. L. J. 506; *Wasudeo v. Hiralal*, (1912) 17 I. C. 884; *Narayan v. Ramkrishnajee*, (1924) 78 I. C. 705. See also *Atmasingh v. Duni Chand*, (1909) P.W.R. 1=I. C. 12; *Musammam Khairan v. The Alliance Bank of Simla Ltd.*, (1919) 50 I. C. 914.

3. *Munna Lal v. Radha Kishan*, (1915) 37 All. 591; *Mahomed v. Sukdoe*, (1911) 13 C.L.J. 467=10 I.C. 51; *Mathura Prashad v. Ramlal*, (1910) 9 I.C. 33; *Basheshar Dayal v. Hargobind*, (1912) 14 I.C. 52; *Venniswami v. Peryaswami*, (1916) 3 L. W. 271=33 I.C. 996; *Sarjoo Prasad v. Nanoo Rai*, (1916) 35 I. C. 779; *Rameshwar v. Sureshwar*, (1917) 39 I. C. 664.

even after confirmation of the sale if that is done within 30 days of the sale.¹

The Court has no jurisdiction except under provisions of the Limitation Act to extend the time for such deposit, though time can be granted with the consent of parties.² Extension of time.

If the period of thirty days expires when the Court is closed, the application and deposit made on the Court's reopening day will be in time.³ The time occupied by infructuous proceedings in a wrong Court may under section 14 of the Limitation Act be excluded in computing the period of thirty days fixed for the application.⁴ So where a person having a right to make the application has by means of fraud been kept from the knowledge of such right the time limited for the application is extended by section 18 of the Limitation Act.⁵ In order to avail himself of this section, the judgment-debtor need not prove fraud subsequent to the execution-sale.⁶

1. *Ismail v. Visvanadhan*, (1915) 8 Bur. L.T., 80=27 I.C. 656; *Sarjoo Prasad v. Nanoo Rai*, (1916) 1 Pat. L.J. 159=35 I.C. 719.

2. *Chaudhry Rameshwar v. Choudurri Sureshwar*, (1917) 2 Pat. L. J. 164=39 I. C. 664; *Shashibhushan v. Charushila*, (1916) 36 I. C. 809.

3. *Munshi Lal v. Ram Narain*, (1912) 35 All. 65; *Munna Lal v. Radha Krishan*, (1915) 37 All. 591. See *Vennisami v. Periyaswami*, (1916) 33 I. C. 996.

4. *Narayan v. Rasulkhan*, (1899) 23 Bom. 531; *Chowdhry Kesri v. Giani Roy*, (1902) 29 Cal. 626. See also *Karimulla v. Mohammad Raza*, (1920) 1 P. L. T. 612=58 I. C. 40; *Abdulla Koya v. Kallumpurath Kanaran*, (1917) 33 M. L. J. 463=43 I. C. 6; *Rajani Banohu v. Kali Prasanna*, (1923) 74 I. C. 279; *Ganpatrao v. Anandrao*, (1920) 44 Bom. 97; *Vidyatheertha v. Venkatarama*, (1918) 33 M. L. J. 682=45 I. C. 460; *Thakur Mahton v. Jhaman Mahton*, (1924) Pat. 496=80 I. C. 761, *Kishundeo v. Ramajan*, (1924) Pat. 67.

5. See Vol. I, 467-71.

6. *Sarvi Begam v. Ram Chunder*, (1925) 23 A.L.J. 760=88 I.C. 500.

The right to have the sale set aside accrues the moment the sale takes place and if the judgment-debtor was, by means of fraud, kept from the knowledge of the sale, he was necessarily kept from the knowledge of his right to have the sale set aside and this section will apply.¹ This section applies only when a party is kept by fraud from knowledge and not from exercising his right.² So where the judgment-debtor was induced by the auction-purchaser to omit to make an application on the promise that the purchaser could make the application himself, the fraud was not of the kind mentioned in this section 18, because the judgment-debtor had knowledge of his rights, but was only prevented from exercising them.³ Section 6 of the Limitation Act does not apply to applications other than those for execution of decrees and does not help to extend time for an application to set aside an execution-sale.⁴

“The person entitled to redeem may be prevented from doing so by the act, fraud or agreement of the purchaser. Where this is the case, courts of equity will grant relief. If a purchase at an execution sale is shown, even by parol evidence, to have been made in pursuance of an agreement between the defendant and the purchaser, by which the latter was to hold his purchase for the benefit of the former, or was to allow the latter longer than

1. *Jotindra Mohan Roy v. Brojendra Kumar*, (1914) 19 C.W.N. 553=24 I.C. 249; *Sheikh Muhammad v. Subba Naicker*, (1923) 17 L.W. 152; *Bashi Ram v. Hossan*, (1919) 51 I.C. 447; *Thakur Mahton v. Jhamon Mahton*, (1924) Pat. 496=80 I.C. 761.

2. *Golam Mujahar v. Goloke Charan*, (1914) 25 I.C. 884.

3. *Harish Chander v. Ganga Bishun*, (1918) 43 I.C. 671.

4. *See Fazil Karim v. Ananda mohan*, (1911) 14 C.W.N. 845 =11 I. C. 401

the statutory period to redeem, the agreement will be enforced in equity. In such a case, if a day is fixed by the parties as the limit of the time in which redemption may be made, and on that day the defendant demands to know the amount required to redeem, and that amount can be ascertained only by an accounting between the parties, and the purchaser refuses to account or to give the desired information, the defendant's right is not lost, but continues until an accounting can be had. So, if any agreement is entered into subsequently to the sale, though by parol, the substance of which is that the purchaser, or other holder of the certificate of sale, will treat it as a mere security, or will give a definite time in which to redeem, it will be enforced. The effect of such an agreement is to prevent any effort on the part of the debtor to redeem within the time designated by the statute; and not to enforce it in his favour, when it had been the means of lulling him into inaction, would be to pervert it into a cruel and fatal decoy. Thus the Courts will not permit nor will they heed the plea that the contract cannot be received in evidence because within the statute of frauds. But a promise to permit the debtor to redeem, made after his right to do so had terminated, cannot be the means of decoying him into the non-exercise of his right. It is within the statute of frauds, and cannot be enforced unless based upon a consideration. An agreement to extend the time for redemption does not transform the purchaser into a mere lienholder. If the defendant does not redeem within the period fixed by the agreement, a conveyance may be executed as in other cases. But if the agreement has been partly executed by the payment of a portion of the amount

required to redeem, the status of the purchaser and the judgment-debtor is not well settled.''¹

A judgment-debtor whose property had been sold on 20th March offered to deposit the decretal amount and the penalty mentioned in rule 89 to the officer conducting the sale. The sale officer, not being competent to entertain an application forwarded it on the 22nd April to the Court which had ordered the sale. On 23rd April the judgment-debtor applied to the Court asking that the money might be received. The Court did not receive the money and heard the matter on the 30th April. The money was deposited on 1st May, but the Court refused to set aside the sale on the ground that the deposit had not been made within thirty days of the sale. It was held, that the actual delay in the deposit of the money was not due to any act on the part of the judgment-debtor, and that, although the deposit was actually made on the 1st May, he had brought the money into the Court on 20th April, and that the appellate Court was therefore justified in setting aside the sale.² So where the judgment-debtor made an application under rule 89, to set aside a sale held in execution of a decree on the last day of limitation, and when the money was tendered to the Treasury Officer shortly before 3 p.m., he refused to take it because there was not sufficient time to count it and also because he thought that it could be paid at any time within three days of the tender and the judgment-debtor paid it the next day which was beyond thirty days after the sale, it was held that

1. FREEMAN ON EXECUTIONS, III. 1859-60.

2. *Gajadhar v. Ram Summiran*, (1919) 17 A.L.J. 991=52 I.C. 161.

the judgment-debtor having done all that lay in his power to deposit the money in time and having been prevented by the action of the Treasury Officer, should be taken to have made the payment within the time allowed by law.¹

Where the non-payment is due to the misdirection of the Court, further time may be allowed to comply with the provision.² The maxim of law is *actus curiae namimun gravabit*" (Act of Court prejudices no man). Therefore when on the last day for making a deposit under this rule, the deposit could not be made as the presiding officer had left the Court earlier than usual, and the deposit was made the next day, the deposit was valid and in time.³

When a sale is set aside under this rule the decree-holder is entitled only to what was due to him under the decree on the date of the payment into Court by the auction-purchaser.⁴ If the judgment-debtor or other applicant fails to deposit the whole amount directed under the rule the Court has no jurisdiction to set aside the sale,⁵ and the mistake of an officer of Court in calculating

1. *Munna Lal v. Radha Kishan*, (1915) 37 All. 591; *Pentacota Gareebu v. Pentacota Peddarayadu*, (1916) 35 I. C. 153.

2. *Tirumalrao v. Syed*, (1899) 22 Mad. 286; *Karamali v. Tamijuddin*, (1920) 32 C.L.J. 12=58 I. C. 816.

3. *Dulhin v. Bansidhar*, (1911) 15 C.L.J. 83=10 I.C. 880; *Mahammed v. Sukhdeo*, (1911) 13 C.L.J. 467=10 I.C. 57.

4. *L. T. Attadies v. R. M K. Chetty*, (1916) 7 Bur. L. T. 68=24 I. C. 479.

5. *Chundi Charan v. Bankz Bihary*, (1899) 26 Cal. 449 F. B.; *Trimbak v. Ramachandra*, (1899) 1 Bom. L.R. 215; *Rahim v. Nundo Lal*, (1887) 14 Cal. 321; *Kalinga v. Narasimha*, (1911) 21 M.L.J. 631=9 I.C. 937; *Sarooj Prasad v. Nanoo Rai*, (1916) 1 Pat. L.J. 459=35 I.C. 779; *Seth Ballabhdas v. Subba Singh*, (1924) Nag. 216=78 I. C. 270; *Narayan v. Ram Krishnaji*, (1924) 78 I. C. 705.

the sum to be deposited cannot avail the judgment-debtor, unless he can show that the mistake was made by an officer whose duty and within whose province it was to give the information.¹ But when the amount due to be deposited was fixed by an order "of the Judge in the presence and with the consent of the pleaders of both parties,"² or where the amount was mentioned on calculation by an officer of Court who ordinarily supplied such information,³ and the deposit made accordingly fell short of the real sum payable owing to the original error of calculation, the Court will set aside the sale and such an order will not be disturbed by the High Court in revision.

Five per cent.

The addition of five per cent ordered by this rule to be deposited is meant as a solatium to the purchaser for the loss of his bargain,⁴ and in that respect it makes no difference whether the purchaser happens to be a third person or the decree-holder himself.⁵

Amount of deposit.

The amount to be deposited is that "specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder." The term 'received' must be construed to mean, actual receipt by the decree-holder and will not

1. *Chundee Charan v. Banke Bihary*, (1899) 26 Cal. 449 F.B.

2. *Makbool v. Bazco*, (1898) 25 Cal. 609.

3. *Seikh v. Beraj Mohini*, (1906) 11 C.W.N. 116; *Ugrah v. Radha Pershad*, (1891) 18 Cal. 255; *Palturam v. Kaminimani*, (1910) 7 I.C. 52; *Gholam v. Manindranath*, (1914) 22 I.C. 842.

4. *Chandicharan v. Banke Behary*, (1899) 26 Cal. 449.

5. *Ibid. Tirumal v. Syed*, (1898) 22 Mad. 286; *Mendai v. Bhuija* (1895) A. W. N. 140.

include a deposit of the sale proceeds into Court,¹ and in determining what has been received, the Court should not give credit to the judgment-debtor for any amount paid by a co-judgment-debtor who has not joined in the application to set aside the sale.² Therefore a purchaser at a private sale from a judgment-debtor of a portion only of the properties which are subsequently sold in execution of a decree is not entitled to ask that the execution sale be set aside on the ground that the amount of the decree has been fully satisfied by himself and other purchaser of the rest of the property.³ Where property was sold separately in nine lots, and the judgment-debtor prayed to set aside the sale of the properties by tendering the balance due under the decree, after deducting the amounts bid by the decree-holder for some of the properties and the amounts deposited by other purchasers it was held that there was no deposit within the terms of the law, to enable the sale to be set aside.⁴

But an agreement by the decree-holder and judgment-debtor to treat a portion of the decree-debt as discharged in consideration of certain services rendered by the judgment-debtor is tantamount to a receipt of the amount,⁵ for payment to

1. *Trimbak v. Ramachandra*, (1899) 23 Bom. 723, *Mahiuddin v. Rangachariar*, (1916) 31 I.C. 913; *Tota Ram v. Chhoturam*, (1923) 25 Bom. L.R. 446=73 I.C. 454; but see *Kripa Nath v. Ram Lakshmi*, (1897) 1 C.W.N. 703.

2. *Karunakara v. Krishna*, (1916) 39 Mad. 429; *Kalinga v. Narasimha*, (1911) 21 M.L.J. 631=9 I.C. 937.

3. *Koppaka Chandrayya v. Robertson*, (1919) 52 I.C. 641.

4. *Kripa Nath v. Ram Lakshmi*, (1897) 1 C.W.N. 703; *Muhiddin v. Rangachari*, (1915) 31 I.C. 913; see *Mathathil Krishna Menon v. Collector of Malabar*, (1914) 22 I.C. 53.

5. *Lakshminarasama v. Lakshammam*, (1912) M.W.N. 756=14 I.C. 326.

the decree-holder need not be in cash to put an application under this rule and it is enough if the decree-holder is satisfied with regard to the whole of the amount due to him.¹

When the amount mentioned in this rule was deposited and the Court set aside the sale and certified satisfaction of the decree, the fact that the decree-holder did not include interest in the application for execution did not render the Court's order invalid or *ultra vires*.² Where the applicant makes the deposit of the money as required by clauses (a) and (b) of this rule, the sale ought to be set aside even though something more on account of poundage was recoverable from him under the head of costs provided for in the last clause of the rule.³

Deposit must
be uncon-
ditional.

The deposit when made into Court must be in cash and not by cheque on a bank.⁴ The deposit must be unconditional that is, must be such as the decree-holder may draw out at once; a deposit not made payable to the decree-holder, until a certain event happens, such as the disposal of an appeal, is not good.⁵ But when the deposit was regularly made in time without any condition attached to it, but the judgment-debtor applied subsequently to keep the money in Court pending disposal of his application to set aside the *ex parte* decree, it was held that though the Court might have properly rejected the petition to keep the money in Court, it could not dismiss the application to set aside the sale, since the deposit was unconditional at the time it was

1. *Anantha Lakshmi v. Kumara*, (1913) 24 M.L.J. 205=18 I.C. 579.

2. *Jadab Krishna v. Apsaraddin*, (1925) 41 C.L.J. 391.

3. *Muthu v. Ramasami*, (1896) 20 Mad. 158.

4. *Ismail v. Visvanathan*, (1915) 8 Bur. L.T. 80=27 I.C. 656.

5. *Mt. Shakoti v. Jotindra*, (1896) 1 C.W.N. 132.

made.¹ When the petition which accompanied the deposit contained a statement that the money was not to be paid out to the decree-holder auction-purchaser till the disposal of a suit which had been commenced by the petitioner in another Court, but as soon as objection was taken by the decree-holder, the petitioner withdrew the objection, it was held the deposit was valid.²

The money deposited under this rule is for payment to the "decree-holder" and he is therefore the only person entitled to the money so paid into Court and no claims to rateable distribution are admissible in respect of it, though there may be other decree-holders entitled to claim rateable distribution under Section 73.³ It is therefore sufficient if the deposit covers the claim of the decree-holder at whose instance the property was brought to sale⁴ and it need not cover decrees held against by other decree-holders also.⁵

No claim to rateable distribution.

In *Upendranath v. Haridas*,⁶ defendant No. 1 obtained two decrees against defendant No. 2; plaintiffs also obtained a decree against defendant No. 2 who had obtained a decree against a third person; defendant No. 1 attached that decree and

1. *Hanooman v. Luchman*, (1904) 8 C.W.N. 355.

2. *Dulhin v. Bansidhar*, (1911) 16 C.W.N. 904 = 10 I.C. 880.

3. *Harai v. Faizlur*, (1913) 40 Cal. 619; *Roshun v. Ram Lall*, (1903) 30 Cal. 262; *Behari Lall v. Gopal*, (1897) 1 C.W.N. 695; *Hari Sundaro v. Shashi Bala*, (1896) 1 C.W.N. 195; *Ganesh v. Vittal*, (1912) 37 Bom. 387.

4. See *Attadies v. R.M.K. Chetty*, (1914) 7 Bur. L.T. 68 = 24 I.C. 479.

5. *Hari Sundari v. Shashi Bala*, (1896) 1 C.W.N. 195; *Pita v. Chunilal*, (1906) 31 Bom. 207; *Ganesh v. Vittal*, (1912) 37 Bom. 387; *Veeraraghavan v. Vatasserri*, (1913) 23 M.L.J. 585 = 17 I.C. 920.

6. (1908) 12 C.W.N. 800. See also *Ramnath v. Murlidhar*, (1903) 6 O.C. 68.

was substituted for defendant No. 2 on the 16th July 1904; plaintiffs also attached that decree and were substituted in place of defendant No. 2 on the 18th November 1904. When at the instance of defendant No. 1 (in execution of the attached decree) properties were sold and the sale was set aside by a deposit under this rule it was held that upon the terms of the rule both plaintiffs and defendant No. 1 were entitled to the money deposited.

In *Sobharam v. Moheshwar*,¹ property belonging to the defendant No. 2 having been sold in execution of a decree, he entered into an agreement with defendant No. 1. Under that agreement the latter deposited the decretal amount under section 310-A of the Code in the name of defendant No. 2, the latter agreeing that, if the sale was set aside, he should sell the property to defendant No. 1. The sale was set aside and the sale by defendant No. 2 to defendant No. 1 was also effected as agreed. It was held, on the appellate Court setting aside the order under S. 310-A and confirming the sale, it was not open to the decree-holder to attach the money deposited as defendant No. 2's money, and defendant No. 1 was entitled to withdraw the same from Court.¹

Bar for
application.

Where a person claiming as legatee under a will applied to pay the decree-amount to prevent a sale but the application was dismissed, it does not bar an application under this rule, for the effect of the previous dismissal was merely to decide that the applicant had no right to raise the attachment on payment of the decree-amount.²

1. (1909) 13 C.W.N. 100=4 I.C. 327.

2. *Dhanammal v. Veeraraghavulu*, (1923) 44 M.L.J. 325=72 I.C. 335.

Where a person applies to set aside the sale under rule 90, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.¹ The policy of this rule is to prevent a person who determines to impeach a sale under section 311 (r. 90) from at the same time obtaining the benefit of the concession granted under section 310 A (r. 89). It was not intended that a party who withdraws all objection under section 311, (without having done more than merely file a petition under the section) should be debarred from claiming relief under section 310A. When both the applications come on for hearing he is entitled to withdraw the petition under section 311 and proceed with that under section 310 A and the Court must then go on as if no application was made under section 311 at all.²

When applications to set aside a sale both under rule 89 and under rule 90 are pending, the Court ought to call upon the applicant to make his election either to withdraw his application under rule 90 or not. If he declines to do so the Court should not allow him to press his application under rule 89. If he is not called upon to make his choice, it cannot be presumed that he withdrew his application under rule 90. The dismissal of an application under rule 89 after arguments does not necessarily mean that an application under rule 90 is not maintainable.³

1. *Rajendra v. Nilratan*, (1896) 23 Cal. 953.

2. *Venkata Krishnayya v. Narasimham*, (1898) 8 M.L.J. 56.
See also *Matadin v. Sheoraj*, (1902) 5 O.C. 137; *Mahammad v. Sajjad*, (1907) 10 O.C. 141.

3. *Sarvi Begam v. Ramachander*, (1925) 23 A.L.J. 760=85 I. C. 500.

If the application under rule 90 is dismissed for default, it does not prevent an application under this rule.¹ But when the application though apparently made under rule 90 is really one falling under section 47, this restriction does not apply and mere mention of the section could not make it in law an application under it.² An appeal against an order rejecting an application under section 310A was held not barred by reason of an application under section 311 having been made by the judgment-debtors other than those who made the application under section 310 A, immediately after the rejection of the later application but before appeal.³

An application made under rule 90 is a bar to an application under rule 89, but the converse is not provided for in the Code. There is no express prohibition against an application being made under rule 90, when an application under rule 89 is made and withdrawn or dismissed.⁴

Parties.

Every judgment-debtor who has separate interest in the properties advertised for sale need not join in the application.⁵ To an application for setting aside sale on deposit, the purchaser and decree-holder are necessary parties,⁶ because no order should be made unless notice of it has been given to all

1. *Murlidhar v. Baldeo Singh*, (1918) 20 O.C. 329=43 I.C. 340.

2. *Harihar v. Rama*, (1909) 33 Bom. 698. See also *Mahomed Akhbar v. Sukhdeo* (1911) 13 C.L.J. 467, =10 I.C. 51.

3. *Ashruf v. Nethal*, (1896) 23 Cal. 682.

4. *Basiruddin v. Faimulla*, (1911) 17 C.W.N. 476=11 I.C. 196.

5. *Karunakara v. Krishna*, (1916) 39 Mad. 429.

6. *Gauhar v. Bansidhar*, (1893) 15 All. 407; *Karanat v. Mir Ali*, (1891) A.W.N. 121; *Bungshidhar v. Kedarnath*, (1896) 1 C.W.N. 114; *Nityanunda v. Hira Lall*, (1900) 5 C.W.N. 63.

persons affected thereby,¹ but the auction-purchaser need not expressly be made a party.²

Under the Code of 1882, any order passed under section 310 A was not appealable, as not being one mentioned in section 588. But if the order was one falling under section 244 an appeal, a second appeal also, was allowed,³ and when the order was not one such, it was subject to revision.⁴ Under the present Code, an order passed on an application made under this rule (89) is appealable as an order and it is one of those appealable orders that are included in the list of appealable orders enumerated in Order 43 rule 1.⁵ No second appeal lies from an appellate order rejecting an application but the order is open to

1. See C.P.C., O. 21, r. 92 (2); *Kripali v. Pairoo*, (1910) 11 C.L.J. 86=5 I.C. 305; *Mt. Bibi Zainab v. Parasnath*, (1924) 2 Pat, 800.

2. *Raj Chandra Das v. Kali Kanta Das*, (1923) Cal. 394; *Mt. Bibi Zainab v. Parasnath*, (1924) 2 Pat. 800.

3. *Srinivasa v. Ayyathorai*, (1898) 21 Mad. 416; *Murlidhar v. Anandrao*, (1900) 25 Bom. 418; *Maganlal v. Doshi*, (1901) 25 Bom. 631; *Pita v. Chunilal*, (1906) 31 Bom. 207; *Pandurang v. Krishnabai*, (1899) 1 Bom. L.R. 74; *Pulchand v. Nurshing*, (1900) 28 Cal. 73; *Harihar v. Rama*, (1909) 33 Bom. 698; *Imbiazi v. Dhuman*, (1907) 29 All. 275; *Manikka v. Rajagopala*, (1907) 17 M.L.J. 291; *Kripanath v. Ramalakshmi Dasya*, (1897) 1 C.W.N. 703; *Bungshidhar v. Kedarnath*, (1896) 1 C.W.N. 114; *Kedarnath v. Umacharan*, (1900) 6 C.W.N. 37. See also *Bhagwati v. Banvari*, (1909) 31 All. 82 F.B.

4. *Maganlal v. Doshi*, (1901) 25 Bom. 631; *Ram Singh v. Saligram*, (1906) 28 All. 84; *Bashiruddin v. Jhori*, (1896) 19 All. 140; *Asimuddi Sheik v. Sundari Bibi*, (1911) 38 Cal. 339 (change in the law pointed out); *Kachu v. Trimbak*, (1920) 44 Bom. 472 (though the decree-holder is the auction-purchaser); *Wasudeo v. Hiralal*, (1912) 8 N.L.R. 177=17 I.C. 884; *Raziuddin v. Bendshri Prasad*, (1916) 36 I.C. 769; *Abdul Nasar v. Lalita Prasad*, (1923) 21 A.L.J. 162=71 I.C. 1018.

5. *Lakshminarasimha v. Lakshammam*, (1911) 11 M.L.T. 380=12 I.C. 169; on appeal, (1912) M.W.N. 325=14 I.C. 326; *Fuzal v. Manzur*, (1918) 40 All. 425; *Ghasiti v. Abdul Samad*, (1907) 29 All. 896.

revision.¹ No appeal lies from an order refusing to restore an application made under this rule, but dismissed for default of appearance. The Court has no jurisdiction to restore an application once dismissed under Section 151 or Order 9 rule 9.² Where a lower Court dismissed for default an application to set aside a sale under Order 21 rule 89 and on a subsequent application by the judgment-debtor reheard the application for setting aside the sale and eventually cancelled the sale, it was held that the Court was competent to treat the later application as one for review and rehear the original application.³

Formalities
may be
dispensed
with by
consent.

“ Whether the redemption is sought to be made by the judgment-debtor, or his successor in interest, for the purpose of nullifying the sale, or by a redemptioner for the purpose of substituting himself in the place of the purchaser and becoming entitled to a conveyance should no further redemption be made, there is no doubt that formalities may be dispensed with by the assent of the parties interested, whether tacit or expressed; and that the redemption is as effectual as if the formalities which have been waived had been in fact performed. If the redemption money is paid by one having no authority from the judgment-debtor to pay it, to an attorney who has no authority from the purchaser to receive it, the latter by accepting the money from such attorney ratifies his act in receiving it

1. *Ananthalakshmi v. Kunnan Chankarath*, (1913) 24 M.L.J. 205=18 I.C. 579; *Sundaram v. Mause Ravuthar*, (1921) 44 Mad. 554 F.B.

2. *Babu Jugal v. Bachinder*, (1919) 52 I.C. 416; *Bhubaneswar v. Tilakdhari*, (1919) 4 Pat. L.J. 135=49 I.C. 617. *Ram Ghulam v. Sheo Deonarain*, (1919) 4 Pat. L.J. 287=51 I.C. 152.

3. *Swaminatha v. Mrs. R. D. Parul*, (1911) 22 M.L.J. 148=12 I.C. 357.

from the debtor, and precludes himself from subsequently denying that a proper and effectual redemption has been made. The expiration of the time in which the debtor is by law allowed to redeem entitles the purchaser to a conveyance which will make his title indefeasible. But until such conveyance is made, the purchaser may, irrespective of the lapse of time, permit the debtor to redeem, and by accepting the redemption money may defeat his title or interest under his certificate of sale, and annul such certificate."¹

Where a sale is set aside under this rule, the decree-holder is only entitled to what was due to him under the decree on the date of the payment into Court by the auction-purchaser.²

Refund and contribution.

Under sections 69 and 70 of the Indian Contract Act, 1872, a person who is interested in the payment of moneys which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other, and when a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.³

1. FREEMAN ON EXECUTIONS, III. 1848.

2. *L. T. Attadies v. R. M. K. Chetty*, (1914) 7 Bur. L. T. 68 = 24 I.C. 479.

3. See on the rights of parties making payments, *Ram Tuhul v. Biseswar Lal*, (1875) 23 W.R. 305 = 2 I.A. 131. For cases of claims for sums paid by interested persons to *avert* sales under decrees, see *Tulsa Kunwar v. Jogeshwar Prasad*, (1906) 28 All. 563; *Omresh Chandra v. Khulna Loan Co.*, (1907) 34 Cal. 92; *Rajani Kanta v. Lal Muhammad*, (1917) 21 C.W.N. 628 = 41 I.C. 242; *Satya Bhushan v. Krishna Kali*, (1914) 18 C.W.N. 1303 = 24 I.C. 259; *Mahatha Har Sankar v. Bardhu Sahu*, (1913) 23 I.C. 720; *Karhaiyalal v.*

The words "interested etc.," may include the apprehension of any kind of loss or inconvenience and not merely the actual detriment capable of assessment in money. Where a reversioner, by depositing the amount under section 310 A, got the sale set aside, he was one so interested and could recover the money except the compensation payable to the purchaser.¹ A usufructuary mortgagee making the deposit is not a volunteer,² and likewise is a purchaser of a *jote*, prior to a rent decree against his vendor.³

Where on a decree against a widow for a debt due by her husband, property was sold and a reversioner deposited the amount due under the decree under this rule and got the sale set aside, it was held that he was a person interested in the payment of the money which the widow was bound to pay and that he was entitled to recover under section 69 of the Indian Contract Act, the money, except the portion which represented the damages payable to the execution-purchaser.⁴

Where immoveable property belonging to a

National Bank of India Ltd., (1911) P.W.R. 32=9 I.C. 966; *Muthurakku v. Rakkappa*, (1913) 26 M.L.J. 66=22 I.C. 9; *Rang Lal v. Kali Shankar*, (1924) 2 Pat. 890; *Panchkori v. Hari Dasjati*, (1916) 25 C.L.J. 325=34 I.C. 341; *Khettra Nath v. Mahomed*, (1913) 19 C.L.J. 525=21 I.C. 102; *Nagendranath v. Jugul Kishore*, (1925) Cal. 1097=90 I.C. 281.

1. *Pankhabati Choudharani v. Noni Hal Singh*, (1913) 18 C.W.N. 778=21 I.C. 207. See however *Gopeswar v. Brojo Sundari*, (1922) 49 Cal. 470.

2. *Beni Madho v. Sanwar Dat*, (1923) All. 127=64 I.C. 918. See *Ram Prasad v. Salik Ram*, (1882) A.W.N. 210.

3. *Bhakra v. Gunamoni*, (1911) 11 I.C. 155; *Bindubashini v. Havendra Lal*, (1897) 25 Cal. 305; *Ratha Madhub v. Sasti Ram*, (1899) 26 Cal. 826.

4. *Pankhabati Choudharani v. Nonihal*, (1913) 18 C.W.N. 778=21 I. C. 207.

caste was sold in execution and the plaintiff, a member of the caste got the sale set aside under this rule by deposit of the money including the allowance of 5% and sued to recover the same against the defendants, as representing the caste, it was held that under section 70 of the Indian Contract Act, the plaintiff was entitled to compensation in respect of moneys paid by him, including the 5% allowance and that such compensation ought to be obtained by a personal decree against the caste in which execution could be levied against the immoveable property but that the plaintiff should undertake not to levy execution otherwise.¹

Where an entire tenure was sold in execution of rent decrees obtained against only some of the tenants, and a tenant who was not a party to the rent suit deposited under section 310 A the prescribed amount to protect his own interest in the holding, the sales were set aside and the liability of the defendants was thereby discharged. In a suit to recover contribution by the depositor, it was held that the plaintiff was entitled to sue the several defendants for contribution each according to his share in the decretal debt only *but not in respect of the deposit of 5% of the purchase money* that the applicant was bound to deposit under the rule. Doss J. said that though the plaintiff had no right to make the deposits under section 310 A, as *his* interest in the holding was not affected by the sales, because the deposits were in fact made without protest from any party or the Court and the joint obligation of all tenants discharged thereby, the mere fact that the deposit was made under section 310 A did not place him in a worse position and did not

1. *Bicoobai v. Hariba*, (1917) 19 Bom. L.R. 650=42 I.C. 9.

alter the equitable right of the plaintiff to be reimbursed proportionately for the deposit, the benefit of which was enjoyed by others.¹ In a later case the right to recover the additional 5 per cent also was upheld.² When as between two judgment-debtors, one made the deposit and got the sale set aside, his right of contribution from the co-judgment-debtor was recognised, though it was said that the right did not extend to the five per cent.³

A payment under rule 89 is a valid payment for the purposes of section 70 of the Indian Contract Act 1872.⁴ Under section 70, to found a right of demand the defendant must have enjoyed the benefit of the plaintiff's payment, the payment itself must have been lawful and the plaintiff must have done it for the defendant not intending to do so gratuitously. In *Yogambal v. Naina Pillai*,⁵ to set aside a sale in execution of a money decree against the defendant, the plaintiff deposited the money under section 310-A, C. P. Code and the decree was discharged. At the time of the deposit, the plaintiff was in possession of the property claiming as reversioner but that claim was not admitted by the defendant and in a suit on the matter then pending, the defendant's contention was later on upheld. When the plaintiff sued for the recovery of the money deposited it was objected that the pay-

1. *Suchand v. Balaram*, (1910) 38 Cal. 1; *Batuk Nath v. Bepin Behari*, (1912) 16 C.W.N. 975=17 I.C. 90; *Sambasiva v. Seethalakshmi*, (1909) 19 M.L.J. 331.

2. *Kangal Chandra v. Gopi Nath*, (1922) 24 C.W.N. 1068=68 I.C. 104.

3. *Dori Lal v. Patti Ram*, (1911) 8 A.L.J. 622=10 I.C. 458.

4. *Jog Narain v. Badri Das*, (1913) 16 C.L.J. 156=13 I.C. 144.

5. (1909) 33 Mad. 15, following *Abdul Wahid v. Shaluki Bibi*, (1894) 21 Cal. 496 (554).

ment was not lawful and that the payment was gratuitous. Sankaran Nair J. said " Though it has been held that the plaintiff had no interest in the property, he believed in good faith he had an interest ; the defendant was a party to the application which was successful and she cannot now be heard to say that the application was unlawful,"¹ but held that as the plaintiff did not make the payment for the defendant expecting reimbursement, he was not entitled to recover.

In *Narayan v. Amgauda*,² in execution of a decree obtained by the defendant against a third party, the property was sold and purchased by the defendant, the plaintiff who claimed to be the owner in possession of the property protested against the sale and ultimately got the sale set aside by deposit under Order 21, rule 89 ; the plaintiff then sued to recover the amount so paid to annul the sale from the defendant, the decree-holder. The suit was dismissed.

*Narayan v.
Amgauda.*

Macleod C.J. said, " It was the intention of the Legislature in framing section 310-A of the Code of 1882 to enable judgment-debtors, whose property had been sold at an undervalue, to recover it if they could pay the decretal amount and five per cent on the purchase price into Court before the sale was confirmed. For the first time by rule 89 a person, jointly interested in the property sold by virtue of a title acquired before the sale, was enabled to get rid of the common ownership of the auction-purchaser leaving it for future decision whether he could recover the amount by enforcing a lien or otherwise

1. See also *Nagendranath v. Jugul Kishore*, (1925) Cal. 1097 = 90 I.C. 281.

2. (1920) 45 Bom. 1094.

*Narayan v.
Amgauda.*

from the judgment-debtor. But I think it was also intended that once the property had been sold the price paid by the purchasers should be available for the decree-holder, leaving it to the purchaser to make what he could out of his purchase, and that if the sale was set aside by payment into Court under rule 89, the money should go to the decree-holder in execution of whose decree the property was sold, in other words, that once property had been sold, the sale could not be set aside by a payment into Court under protest. The auction-purchaser is entitled to the benefit of his purchase whatever it may amount to, and it is only under certain conditions that he can be deprived of that benefit, namely, that he gets five per cent. for the loss of his bargain, and the decree-holder gets the benefit of his execution sale. If the Legislature had intended that sales could be set aside if payment was made into Court conditionally, then it would have said so. It is a mere accident that in this case the decree-holder purchased the property himself. If the true owner allows the attachment to continue, and the property to be sold as belonging to the judgment-debtor, he can treat the sale as a nullity and resist the auction-purchaser. There is no necessity for him to get rid of the sale of what in his opinion does not exist. The attachment of the property itself is a different matter, that may seriously inconvenience him, but if he is the true owner the sale of a non-existent interest in it does not affect him. If he pays in money to get that sale set aside it can only be treated as a voluntary payment.

“There is a further consideration, that if a decree-holder could be deprived in this way of the money which in effect resulted from the sale in

execution of property alleged to belong to his judgment-debtor, he might be deprived of any further opportunity of realizing the fruits of his decree. He is entitled to what the auction-purchaser has paid and it makes no difference to him whether or not the auction-purchaser gets anything tangible in return for his money. If he does not get what has been paid or agreed to be paid by the auction-purchaser he is entitled to get that which is paid to get rid of the auction-purchaser.”

*Narayan v.
Amgauda.*

CHAPTER XXIII

Annulment of Sales

Annulment for fraud or material irregularity—"Person entitled to rateable distribution"—"Interests affected by the sale"—Instances of material irregularity—Instances of no material irregularity—Fraud—Publishing and conducting the sale—Grounds outside the rule—Injury—Connection between irregularity and injury—Direct evidence—Change in the law—Form of application—Parties to application—Appeal—Application must be before confirmation—Estoppel—Waiver—Laches—Annulment of sales for want of saleable interest—Sale to be confirmed or annulled—Bar of suits—Application under section 47 to set aside sales—Grounds of—Limitation—Bar of suits by section 47—Suit to set aside sales—Limitation—Inherent power of Court to set aside sales—Suit to confirm sale.

Annulment
for fraud or
material
irregularity.

A sale may be set aside on the ground of fraud or material irregularity. Under Order 21, rule 90, C.P. Code "Where any immovable property has been sold in execution of a decree the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it: Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

Person
entitled to
rateable
distribution.

Under the corresponding section of the Code of 1882,¹ "a person entitled to rateable distribution"

1. S. 311: The decree-holder or any person whose immoveable property has been sold under this chapter may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it. But no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." See section 256 of Act VIII of 1859.

was not expressly mentioned. But it was thought that the term decree-holder included those that were entitled to rateable distribution under Section 295. For, if a limited construction is the correct one, "then the right of the other decree-holders who applied for execution would, in certain given events, be prejudiced. For instance, if the first decree-holder dies and if no representative of his applied under section 311 or if the decree-holder did not choose to point out to the Court the irregularity and apply for a resale, then, if no other decree-holder could apply, the irregularity and consequent loss would be incapable of remedy."¹ This interpretation of the word 'decree-holder' has been expressly included in the present Code. Therefore a decree-holder who is not entitled to rateable distribution cannot apply to set aside the sale.² The holder of a money-decree cannot apply to set aside a sale held under a mortgage-decree.³ A decree-holder is entitled to apply under this rule, even though his application for execution was dismissed for non-prosecution, if once he had become entitled to rateable distribution.⁴ A person who attached the debtor's property in a Court different from that which sold the proper-

Person
entitled to
rateable
distribution.

1. *Lakshmi v. Kuttunni*, (1887) 10 Mad. 57 ; *Sorabji v. Govind*, (1891) 16 Bom. 91 (101) ; *Ajudhia Prasad v. Nand Lal*, (1893) 15 All. 318 ; *Chakrapani v. Dhanji*, (1901) 24 Mad. 311 ; *Bejoy Singh v. Hukum Chand*, (1902) 29 Cal. 548 (disapproving of the limited construction placed in *Matungini v. Monmotha Nath*, (1900) 4 C.W.N. 542) ; *Kathiresan v. Ramasami*, (1914) 27 M.L.J. 302=26 I.C. 93 ; *Athappa v. Ramakrishna*, (1898) 21 Mad. 51.

2. *Chattrapat v. Jadukul Prosad*, (1893) 20 Cal. 673 ; see *Dhirendra Nath v. Kamini Kumar*, (1924) Cal. 786=84 I.C. 119. As to persons entitled to rateable distribution, see chapter on TERMINATION OF EXECUTION *post*.

3. *Rustomji v. Ferozshaw*, (1925) Sindh, 101.

4. *Byomkesk Chakrabutty v. Hemanta Kumar*, (1914) 18 C.W.N. 1311=24 I.C. 83.

ty is not entitled to rateable distribution and so cannot apply to set aside the sale.¹ Where the lands in suit were attached by a decree-holder on 25-3-1922 in execution of his decree and at the instance of the petitioner the same lands were attached before judgment on 22-4-1922, a month after the lands had been attached by the decree-holder, and the lands were sold on 14-9-1922, when the petitioner's suit in which the order for attachment before judgment was passed was pending at the time, it was held that the petitioner could not apply to set aside the sale under this rule.² The rateable distribution referred to in this rule is the distribution under section 73 of the Code and does not cover the distribution of dividends under the Insolvency Acts.³

Interests
affected by
the sale.

The word 'interests' means interests in the property sold. Creditors who have nothing more than a bare chance of getting a higher dividend out of the debtor's general assets if the sale is set aside are not such persons as can be said to have such an interest as is contemplated by the rule.⁴ "Any person whose immovable property has been sold" under the Code of 1882 was construed to mean "any person whose interests are affected by the sale" and that interpretation has now been substituted for the original expression. For a person's interests to be legally affected, his title to the property or a part thereof must have been

1. *Bijoy Singh v. Hukum Chand*, (1902) 29 Cal. 548.

2. *Badiar Rahman v. Saradakanta*, (1925) Cal. 1103=89 I.C. 688.

3. *Sulemanji v. Pragji*, (1917) 10 S.L.R. 189=39 I.C. 932.

4. *Sulemanji v. Pragji*, (1917) 10 S.L.R. 189=39 I.C. 932 ; *Pragji v. Assa Jalal*, (1916) 35 I.C. 530; *Kathiresan v. Ramasami*, (1914) 27 M.L.J. 302=26 I.C. 93.

in existence at the date of the sale¹ and must be damaged by the sale and that right subsists though subsequent to the sale and at the date of the application his interest has been transferred to another.²

Interests
affected by
the sale.

Therefore a person claiming by title paramount to the judgment-debtor is not within the meaning of the expression, in as much as his title to the property is not affected by the sale, whether it were regular or irregular.³ Accordingly where a person, alleging to be the undivided brother of a judgment-debtor sought to set aside the sale of property as his legal representative it was said that if the property belonged to the joint family, it must have on the death of judgment-debtor survived to the applicant and become his exclusive property and as the claim was on a paramount title, the remedy was only by a regular suit and not by a proceeding under section 311.⁴

A co-sharer of an undivided immoveable property cannot apply.⁵ But where in a proceeding under Chapter XIV of the Provincial Insolvency Act in execution of a decree for arrears of rent under section 148 A of that Act some of the co-sharer landlords brought the defaulter's tenure to sale, it was held that the remaining co-sharer landlords could

1. *Nagesur Pershad v. Bindeshwari*, (1915) 29 I.C. 402.

2. *Shandi Bibi v. Mobarak Ali*, (1925) 87 I.C. 94; *Mahomed Mohideen v. Ramanadhan*, (1926) 21 L.W. 873.

3. *Asmutunnissa v. Ashruff Alli*, (1888) 15 Cal. 488 F.B. [overruling *Abdul Huq v. Mohini Mohun*, (1887) 14 Cal. 240 and approving of *Joge Narain v. Bhugvani*, (1865) 2 W.R. Mis. 13; *Krishnarav v. Vasudev*, (1874) 11 B.H.C.R. 15; *Maina Koer v. Luchman*, (1874) 1 C.L.R. 250 and *Rakal Chunder v. Dwarka Nath*, (1886) 13 Cal. 346]; *Purshottam v. Purshottam*, (1884) 8 Bom. 532; *Ram Narain v. Ram Chunder*, (1913) 20 I.C. 16; *Maung Kun v. Ma Nan*, (1922) 4 U.B.R. 97=70 I.C. 900. The contrary view was taken in *Sheo Prasad v. Hira Lal*, (1889) 12 All. 440 (457).

4. *Subbarayudu v. Pedda Subbaraju*, (1893) 16 Mad. 476.

5. *Bisheshur v. Hari*, (1884) 5 All. 42.

Interests
affected by
the sale.

apply to set aside the sale.¹ An adjudged insolvent, whose estate is vested in the receiver,² or a person who attaches property before judgment,³ cannot apply.

A mortgagee-purchaser of an occupancy-holding in execution of his mortgage-decree can apply under this rule to set aside a sale of the holding in execution of a rent-decree.⁴

A purchaser of a tenure at a private sale from the recorded tenant prior to a decree for arrears of rent in execution of which the tenure is sold can apply.⁵ A person who claims to be a purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent can apply.⁶

A person who has purchased the same property at a prior execution sale, such prior sale not having been confirmed, cannot apply.⁷

A purchaser at an execution sale is not a party

1. *Narendra Bhusan v. Khagendra Bhusan*, (1919) 23 C.W.N. 619=50 I.C. 329; *Jogendra Nath v. Monmotha Nath*, (1913) 15 I.C. 668.

2. *Pragji v. Assa Jalal*, (1916) 10 S L.R. 53=35 I.C. 530.

3. *Jogendra Nath v. Monmotha Nath*, (1913) 17 C.W.N. 80=15 I.C. 668; *Matungini v. Manmotha Nath*, (1900) 4 C.W.N. 542; *Madhusudan v. Rash Mohan*, (1915) 21 C.L.J. 614=30 I.C. 38.

4. *Tarini Prosad v. Deva Prasanna*, (1925) Cal. 925=86 I.C. 612.

5. *Azgar Ali v. Asaboddin*, (1905) 9 C.W.N. 134 explaining *Kalu Saha v. Bhagbati*, (1902) 6 C.W.N. 127. See also *Kunja Behari v. Sambhuchandra*, (1904) 8 C.W.N. 232; *Bendini v. Peary Mohan*, (1904) 8 C.W.N. 55; *Omar Ali v. Moonshi Rasiruddin*, (1909) 7 C.L.J. 282.

6. *Aubhoya Dassi v. Pudmo Lochun*, (1895) 32 Cal. 802, distinguishing *Asmutunmisa v. Ashrujf Ali*, (1888) 15 Cal. 488.

7. *In the matter of Bhagabati Churn*, (1882) 8 Cal. 367.

to the suit and the only case in which the Court is empowered summarily to set aside a sale at his instance is that provided by section 313. Where the auction-purchaser has been induced by fraud to pay a larger price than he otherwise would have offered, he has no right to apply under section 311 or 313.¹ If he has bought a property the title to which is defective and has been misled on account of any fraud or omission on the part of the decree-holder it will be open to him to seek his remedy against the decree-holder by a suit for such damages as the law allows. The purchaser cannot attack his own purchase except on the ground that the judgment-debtor has no saleable interest.² But this view taken in Calcutta and Patna³ has not been adopted elsewhere. In *Bhavirisetti Gopalakishnayya v. Sanjeevi Reddi*,⁴ the Madras High Court said that the word 'interests' in rule 90 was not confined to interests in existence prior to the sale so as to exclude interests created by the sale and as such an auction-purchaser could apply to set aside the sale under that rule and it was said that there was a change in the law under the present Code, because the words 'whose interests are affected by the sale' did not occur in Section 310 of C. P. Code of 1882, and "if the auction-purchaser's interests are affected by an order setting aside the

Interests
affected by
the sale.

1. *Brij Mohun v. Rai Uma Nath*, (1893) 20 Cal. 8 P.C.

2. *Khetro Mohan v. Sheikh Dilwar*, (1918) 3 Pat. L.J. 516=46 I.C. 614.

3. See also *Sheo Gobind v. Dhanukdhari*, (1913) 19 C. W. N. 1291=21 I. C. 774; *Kartick Chandra v. Nagendranath*, (1923) 5 Pat. L. T. 41=74 I. C. 760.

4. (1920) 38 M. L. J. 228=55 I.C. 333. For Nagpore, see *Shiu Prasad v. Santoji*, (1922) Nag. 113=65 I. C. 875 and contra *Balwant v. Ratanlal*, (1922) 68 I. C. 429; *Ravi Nandan v. Jagarnath*, (1925) 47 All. 479.

Interests
affected by
the sale.

sale, it is difficult to see why his interests are not also affected by the sale, although it is true that they are affected in a different sense and in a different degree."

A reversioner entitled to succeed on the death of a Hindu widow can apply under this rule as a person whose interests are affected by the sale.¹ A legal representative of a judgment-debtor though not brought on record,² or though wrongly so brought,³ can apply. Where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner can apply. The test is whether the petitioner would be entitled to bring a suit to contest the sale or to recover the property,⁴ and the beneficial owner is bound by a decree passed against the benamidar.⁵ A contrary view was latterly taken in *Hardwari Lal v. Salamat-ullah*⁶ that the real owner is incompetent to apply. It was said "If his property has been sold in execution of a decree obtained against his son and he is not estopped by the provisions of the Transfer of Property Act from setting up his true title, then the sale is a nullity as against him and cannot affect his interests. If on the other hand he has no real interest in the property in suit he should obviously not be permitted to maintain the application under rule 90." Their Lordships thought that the earlier decisions were under the old Code and that the law had been altered. But all the same it

1. *Brij Kishore v. Pratab*, (1919) 4 Pat. L J. 360 = 51 I.C. 359.

2. *Sheo Prasad v. Hira Lal*, (1889) 12 All. 440 (457-8).

3. *Malkarjun v. Narhari*, (1900) 25 Bom. 337 P. C.

4. *Abdul Gani v. Dunne*, (1893) 20 Cal. 418 F. B. (Banerjee J. dissenting); *Timmana v. Mahabala*, (1896) 19 Mad. 167.

5. *Khub Chand v. Narain Singh*, (1881) 3 All. 812; *Gopinath v. Bhugwat*, (1884) 10 Cal. 697 (705).

6. (1916) 38 All. 358.

has been thought that the words "whose interests are affected by the sale" have a wider import than the corresponding expression in section 311 of the Code of 1882.¹ An attaching creditor can therefore apply under this rule.²

The following have been held to be material irregularities :—A statement that the purchaser would be liable for arrears of rent on tenure;³ an omission or misstatement of the Government revenue,⁴ or of the value of the property,⁵ or of the amount of income or incumbrances on it,⁶ or of the precise amount of claims received

Instances of material irregularity.

1. *Abdul Aziz v. Tafajuddin*, (1914) 19 C. W. N. 326=23 I. C. 839; *Sailabala Debi v. Nritya Gopal Sen*, (1915) 22 C. W. N. 143=31 I. C. 859.

2. *Dhirendra Nath v. Kamini Kumar*, (1924) 51 Cal. 495.

3. *Mahomed Jawad v. Mahraj Kumar Gopal Saran*, (1924) 80 I.C. 223, because under law the purchaser is not so liable.

4. *Madarsah v. Palniappa*, (1900) 23 Mad. 628; *Baliram v. Narsingdas*, (1923) 40 M. L. J. 403=75 I.C. 546 P. C.; *Gridhari v. Hurdeo*, (1876) 26 W. R. 44 P. C.; *Mohabir v. Olpherts*, (1882) 9 Cal. 656 P.C.; *Umadi Rajaha v. Sri Raja Velugoti*, (1913) 38 Mad. 387.

5. *Sadatmand v. Phul Kuar*, (1898) 20 All. 412 P. C.; *Umadi Rajaha v. Sri Raja Velugoti*, (1913) 38 Mad. 387; *Basanta Kumar v. Ram Kanai*, (1911) 13 C. L. J. 192=9 I. C. 698; *Sivadurga Debi v. Rajmohan*, (1911) 10 I.C. 475; *Rudrananda v. Prithichand*, (1911) 14 C. L. J. 346=11 I.C. 438; *Rai Kishore Dasi v. Mukund Lal*, (1911) 11 I.C. 295; *Gour Kishore v. Chandra Mohan*, (1912) 16 I. C. 394; *Jadunath v. Aswani Kumar*, (1912) 16 C.L. J. 98=16 I.C. 974; *Mohendranath v. Bepin Behary Ghose*, (1916) 33 I.C. 946; *Mahamid Ali v. Mahabir*, (1916) 35 I. C. 411; *Hansraj v. Sheik Mohideen Rowther*, (1915) 29 I. C. 745; *Chokkalinga v. Srinivasa*, (1913) 21 I.C. 592; *Nandkiswar v. Kedarnath*, (1917) 40 I. C. 849; *Sakhichand v. Kalanand*, (1917) 4 Pat. L.W. 88=42 I. C. 394; *Chatterpat v. Surendranath*, (1918) Pat. 33=44 I. C. 412; *Mahomed Nizamuddin v. Aminuddin*, (1922) 4 Lah. L. J. 441=67 I.C. 885; *Pareshnath v. Haricharan*, (1919) 52 I. C. 23; *Mahammad Jahur v. Gopalsaran*, (1920) 1 Pat. L. T. 441=57 I. C. 640.

6. *Athappa v. Ramakrishna*, (1898) 21 Mad. 51; *Moti Laul v. Bhawani*, (1902) 6 C. W. N. 836; *Krishna v. Motichand*, (1913)

Instances of
material
irregularity.

from other decree-holder ;¹ attaching or admitting property of sale under a mortgage-decree and subsequently announcing only the right, title and interest will be sold ;² misleading description of property ;³ omission to issue notice before preparing proclamation ;⁴ omission to specify in the proclamation of sale the extent of the property to be sold ;⁵ omission to have drum beaten as required under rule 67 ;⁶ omission to affix a copy of the sale proclamation under rule 67 ;⁷

omission to notify encumbrances⁸ ; making a partition in execution instead of selling the undivided share ;⁹ an adjournment of sale by bailiff without leave of Court ;¹⁰ selling immoveable property before the expiration of 30 days from the date of the affixture of the proclamation under rule 68 ;¹¹

40 Cal. 635 P. C.; *Mohendranath v. Behary Ghose*, (1916) 33 I. C. 946 ; *Maniram v. Lachmandas*, (1917) P. L. R. 11=39 I. C. 59 ; *Rai Kishari Dasi v. Mukund Lal*, (1911) 11 I.C. 295 ; *Babu Sitapat Ram v. Mahabir Prasad*, (1925) Oudh. 424=88 I.C. 532 ; *Rastamji v. Perozshaw*, (1925) Sindh 101. But see *Mohendro Coomar v. Heera Mohun*, (1881) 7 Cal. 723.

1. *Mahamed Ali v. Mahabir*, (1916) 35 I. C. 411.

2. *Mohiny Mohun v. Bhoobunjoy*, (1880) 6 C.L. R. 237.

3. *Chinnabai v. Dhula Kuppa*, (1919) 21 Bom. L.R. 281=50 I.C. 384.

4. *Jagannath v. Daud*, (1924) 75 I.C. 103.

5. *Madarsah v. Palniappa*, (1900) 23 Mad. 628 ; *Promathanath v. Bejoy Madhab*, (1919) 53 I. C. 143 ; *Rai Kishori Dasi v. Mukundlal*, (1911) 11 I.C. 295.

6. *Trimbak v. Nana*, (1886) 10 Bom. 504 ; *Bhagwati v. Mukand*, (1920) 56 I.C. 523 ; *Nandlal v. Tola Ram*, (1922) 67 I. C. 752.

7. *Kalytara v. Ram Coomar*, (1881) 7 Cal. 466 ; *Nana Kumar v. Golam Chunder*, (1881) 18 Cal. 422 ; *Laxmi Narayan v. Purnabai*, (1918) 48 I.C. 611.

8. *Shiv Prasad v. Santooji*, (1922) 18 N.L.R. 98=65 I.C. 875.

9. *Mathuradas v. Fatma*, (1868) 5 B.H.C.R.A.C. 63.

10. *Vaduganatan v. Foy*, (1914) 6 Bur. L.T. 65=25 I.C. 192.

11. *Abdul Nossia v. Dcolal*, (1882) 11 C.L.R. 303 ; *Tasadduk v. Ahmad*, (1893) 21 Cal. 66 ; *Hurbuns v. Bhairo Pershad*, (1879) 4

selling when the judgment-debtor has been declared insane without a guardian ;¹ selling without fresh proclamation after a portion of the property has been released to a third party ;² selling without a fresh proclamation when there has been postponement where the sale is adjourned for more than one week, unless the judgment-debtor waives the proclamation ;³ omission to mention the place of sale ;⁴ omission to notify that the property would be sold on a day named or as soon thereafter as it might come up in the list ;⁵ notifying as charge a higher amount than is really due ;⁶ notifying a sale subject to charge but selling free from charge ;⁷ selling half the property after the whole has been proclaimed for sale ;⁸ selling a debt secured by a mortgage of immoveable property under the provi-

Instances of material irregularity.

C.L.R. 23 ; *Venkata v. Sama*, (1890) 14 Mad. 227 ; *Laxminarayan v. Purnabai*, (1918) 48 I.C. 611 ; *Ramji Patel v. Karkaji*, (1924) Nag. 293.

1. *Narayana v. Kalia Sundaram*, (1896) 19 Mad. 219 ; *Keshawesarendra v. Devendrabala*, (1915) 29 I.C. 211. See C.P.C., O. 32, r. 15 and Chapter on VOID AND VOIDABLE SALES, *supra*.

2. *Shib Prokash v. Sardar Doyal*, (1887) 3 Cal. 542. See *Sethai Goundan v. Subramania*, (1920) 11 L.W. 477.

3. *Bipin Behari v. Jatindranath*, (1910) 37 Cal. 897 ; *Gopee Nath v. Luchmeeput*, (1878) 3 Cal. 542 ; *Shoshee Mukhee v. Dwarkanath*, (1866) 6 W.R. Mis. 84 ; *Kishen Prostinno v. Narduma*, (1872) 17 W.R. 339 ; *Mohunt Megh Lall v. Shib Perashad*, (1881) 7 Cal. 34. See also *Jamini Mohan v. Chandra Kumar*, (1901) 6 C.W.N. 44. *Sethai v. Subramanya*, (1920) 11 L.W. 477 ; *Mohamed v. Sayed Ali*, (1914) 25 I.C. 18 ; *Moti Singh v. Prithipal*, (1914) 25 I.C. 17 ; *Kirpal Singh v. Kedarnath*, (1917) 3 Pat. L.W. 357 = 41 I.C. 68.

4. *Tuljaram Rao v. Ramchandra Rao*, (1921) 41 M.L.J. 465 = 68 I.C. 916.

5. *Bykunt Nath v. Juggat Mohun*, (1875) 24 W.R. 240.

6. *Kanji Mal v. Bibi Sailo*, (1886) 8 All. 110 ; *Kasthuri Aiyangar v. Arunachelam*, (1916) 1 M.W.N. 195 = 34 I.C. 350.

7. *Fazlahar Rahaman v. Jawahir*, (1911) 9 I.C. 383.

8. *Pannah Lal v. Sri Ram*, (1877) 1 Shome 10. See also *Nurfihan v Girdhari Lal*, (1911) P.L.R. 222 = 12 I.C. 579.

Instances of
material
irregularity.

sions applicable to moveable property;¹ selling without fixing the hour of sale;² selling without specifying the adjourned hour of sale ;³

failure to direct advertisement of sale in the gazette;⁴ selling on a day previous to that fixed in the order of postponement;⁵ selling at an hour or place not mentioned in the notification ;⁶ changing the specified order of sale without notice ;⁷ selling properties all together when advertised to be sold by lots ;⁸ or without proper attachment ;⁹ adjourning sale from time to time without sufficient ground ;¹⁰ delay in making the deposit required by rule 78 (2);¹¹

1. *Srinath Dutt v. Gopal Chundra*, (1886) 9 Cal. 511. See *Sami Ayyar v. Krishnasami*, (1886) 10 Mad. 169.

2. *Surnomoyee v. Dakhina Ranjan*, (1896) 24 Cal. 291; *Mahmud v. Gobind*, (1915) 18 O.C. 1=28 I.C. 184; *Pran Singh v. Janardan Singh*, (1912) 14 C.L.J. 541=13 I.C. 337; *Gour Kishore v. Chandra Mohan*, (1912) 16 I.C. 394.

3. *Bhikari Misra v. Rani Surja Moni*, (1901) 6 C.W.N. 48; *Mahabir v. Dhanukdhari*, (1904) 31 Cal. 815; *Pran Singh v. Janardhan Singh*, (1912) 14 C.L.J. 541=13 I.C. 337.

4. *Gobi Chand v. Benarsi*, (1919) 1 Lah. L.J. 197=53 I.C. 794.

5. *Jhoomuck v. Rajah Radha Persad*, (1876) 25 W.R. 328; *Safdar Ali v. Fazal*, (1915) P.L.R. 156=30 I.C. 524.

6. *Khodeja v. Johad*, (1876) 14 W.R. 320; *Tasadduk v. Ahmad*, (1915) 21 Cal. 66; *Shafdar v. Fazal*, (1915) P.L.R. 156=30 I.C. 524; *Krishnaji v. Bomanji*, (1909) 11 Bom. L.R. 380=2 I.C. 459; *Ranjit Singha v. Jnanendra*, (1915) 19 C.W.N. 963=27 I.C. 825. But see *Jayarama v. Vridhagiri*, (1920) 44 Mad. 35; *Hari Sadhan v. Shib Gopal*, (1922) 35 C.L.J. 140=65 I.C. 746.

7. *Pokhray v. Gossain Munraj*, (1869) 12 W.R. 281. See *Pitty Theygaraya Chettiar v. Sivapada Mudali*, (1911) 21 M.L.J. 1008=12 I.C. 137.

8. *Urquhart v. Nundeeput*, (1869) 12 W.R. 492; *Sreekunt Dass v. Ramjeebun*, (1873) 18 W.R. 342. For the converse case, see *Abdul Hye v. Macrae*, (1874) 23 W.R. 1; but not when there is no order for sale by lots, *Mani Ram v. Lachman*, 11 P.L.R. 1917=39 I.C. 59.

9. *Bipin Behari v. Kantichandra*, (1913) 18 I.C. 715.

10. *Venkata v. Sama*, (1890) 14 Mad. 227.

11. *Venkata v. Sama*, (1890) 14 Mad. 227; *Mohamed Ali v. Mahabir*, (1916) 35 I.C. 411.

selling in contravention of an injunction,¹ or of a stay;² selling without notice to³ or after notice to a wrong⁴ legal representative of the deceased judgment-debtor; selling after notice to the legal representative sent by the Court to which the decree is transferred for execution and not the Court which passed the decree;⁵ selling after a notification so vague in the description of property as to be misleading;⁶ selling at an unusually early hour;⁷ purchasing by decree-holder without abiding by the conditions of leave;⁸ selling without appointing guardian ad-litem to a minor defendant.⁹

Instances of
material
irregularity.

When neither the mortgage bond nor the decree thereon gives a direction as to the order in which the mortgaged properties are to be sold in execution, the mortgagee can choose the order in which they are to be sold. But where there are a number of judgment-debtors with right of contribution they can apply to the executing Court to look into the equities *inter se* and direct a sale in consonance therewith and failure to do is a material irregularity.¹⁰

1. *Dharam Chand v. Mitusi Bussan*, (1920) 54 I.C. 928.

2. See *Ramanathan v. Arunachellam*, (1914) 38 Mad. 766.

3. *Rasaraj v. Prosanna Kumar*, (1913) 40 Cal. 45; *Mahpal v. Ram Bahadur*, (1919) U.D.L.R. 7=52 I.C. 167; *Sham Sundar v. Jhumat Shah*, (1911) 20 C.L.J. 337=11 I.C. 893. See also *Miraj Din v. Dilbaga Rai*, (1914) P.L.R. 144=25 I.C. 51.

4. *Malkarjun v. Narahari*, (1900) 25 Bom. 337.

5. *Pasumarti v. Ganti*, (1915) 28 M.L.J. 525=29 I.C. 314.

6. *Banke Lal v. Jagat Narain*, (1900) 23 All. 168.

7. *Ranjit Singha v. Jnanendra*, (1915) 19 C.W.N. 963=27 I.C. 825.

8. *Raj Kuer v. Chunno Lal*, (1912) 16 O.C. 86=15 I.C. 888.

9. *Keshawe Surendra v. Devendrabala*, (1915) 29 I.C. 211. See also *Krishna v. Moti Chand*, (1913) 40 Cal. 635 P.C.; *Narayana v. Kaliasundaram*, (1896) 19 Mal. 219; *Kolli Nagiah v. Gopala Krishniah*, (1911) 9 M.L.T. 260=9 I.C. 252.

10. *Raghunath Sahai v. Daroga Sahu*, (1924) 78 I.C. 609.

Instances of
no material
irregularity.

The following have been held to be not material irregularities ; issuing notice of attachment and sale together;¹ issuing notice of sale after the death of the original decree-holder, and before his legal representative is brought on record;² entering the wrong Taluq in the proclamation, if it be served in the right village;³ notifying the sale in an inferior cutchery, the chief cutchery being beyond jurisdiction;⁴ overstating the balance due at the time of the sale;⁵ selling property for a demand for which it was only in part liable;⁶ selling part of property attached ;⁷ selling property in lots, though attached and proclaimed in entirety;⁸ selling property for a low or inadequate price;⁹ omitting to mention the numbers and values of the promissory notes sold;¹⁰ selling on a closed holiday;¹¹ postponing

1. *Hurro Soonduree v. Brojo Gobind*, (1865) 4 W.R. Mis. 12 ; *Fani Bhushan v. Surendernath*, (1921) 35 C.L.J. 9=64 I.C. 25.

2. *Gobind v. Bamun*, (1874) 22 W.R. 481; *Aba v. Dhondubai*, (1894), 9 Bom. 276 ; *Sheo Prasad v. Hira Lal*, (1889) 12 All. 440 F.B.; *Abdur Rahman v. Shankar Dut*, (1895) 17 All. 162; *Net Lall v. Sheikh Kareem*, (1896) 23 Cal. 686 ; *Berhamdeo v. Salig Ram*, (1925) Pat. 384. *Contra*, *Groves v. Administrator-General of Madras*, (1898) 22 Mad. 119.

3. *Nooral Hossein v. Ram Coomar*, (1876) 22 W.R. 326.

4. *Hubebool v. Allender*, (1870) 14 W.R. 44.

5. *Chuttur v. Dhurram*, (1869) 1 N. W. P. 61 ; *Kasthuri Aiyangar v. Pisa Arunachalam*, (1916) M.W.N. 195=34 I. C. 350.

6. *Raghubar v. Ilahi Baksh*, (1885) 7 All. 450.

7. *Baidyanath v. Prohabati*, (1924) Pat. 803=78 I.C. 315.

8. *Samipillai v. Krishnasami*, (1897) 21 Mad. 417 ; *Roy Nandipat v. Alexander*, (1870) 13 W.R. 209; *Abdul v. Macrae*, (1875) 23 W.R. 1.

9. *Lakshmi v. Krishnabhat*, (1884) 8 Bom. 474 ; See also *Rect Bhunjan v. Meeturjit*, (1866) 6 W.R. Mis. 31 ; *Hubebool v. Allender*, (1870) 14 W.R. 44 ; *Alimooddy v. Chunder Nath* (1875) 24 W.R. 227 ; *Korapalu Hengsu v. Gouri Hengsu*, (1925) Mad. 729=88 I.C. 228.

10. *Luchmeeput v. Lekraj Roy*, (1867) 8 W.R. 415.

11. *Bisram v. Sahib-un-nissa*, (1880) 3 All. 333. See contra

sale for more than seven days without fresh proclamation;¹ selling portion of the estate within jurisdiction, although the greater part falls within another district;² postponing sale in obedience to an injunction by a subordinate Court;³ not beating drum at the time of the sale;⁴ selling after the judgment-creditor had asked the officer to stay the sale;⁵ disparaging remarks by by-standers or purchasers other than the decree-holder;⁶ omission to pay 25 per cent. of the purchase-money at the time of the sale.⁷

Instances of
no material
irregularity.

Under the Code of 1908, fraud has been included under the rule. The Select Committee said "We think that the existing law as contained in section 311 of the Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under Section 311, a decree and open to second appeal. This result which often involves a con-

Fraud.

Haro Jamedar v. Jalub Chunder, (1865) 3 W.R. Mis. 24. See also *Ram Das v. Official Liquidator*, (1887) 9 All 366.

1. *Hurbans v. Bhairo Pershad*, (1879) 4 C.L.R. 23; *Gajraj-mati v. Akbar Husain*, (1906) 29 All. 196; *Venkata v. Sama*, (1891) 14 Mad. 227.

2. *Shib Narain v. Gobind*, (1875) 23 W.R. 154. See *Kalee Prosunno v. Dinonath*, (1873) 19 W.R. 435.

3. *Amir Dulhin v. Administrator-General*, (1895) 23 Cal. 357.

4. *Trimbak v. Nana*, (1896) 10 Bom. 504; *Bhagwati Prasad v. Mukund*, (1920) 56 I.C. 523.

5. *Kaminee v. Gourmoney*, (1876) 1 Ind. Jur. N.S. 359.

6. *Gunga Narain v. Anunda Moyee*, (1883) 12 C.L.R. 404; *Lal Mohun v. Nunu Mohamed*, (1889) 17 Cal. 152. See also *Woopendro Nath v. Brojendronath*, (1881) 7 Cal. 346; *Rukhinee Bulluh v. Brojonath*, (1879) 5 Cal. 308; *Lalman v. Bapulal*, (1882) 2 A.W.N. 138; *Mahomed Mira v. Savvasi Vijaya*, (1899) 23 Mad. 227 P.C.; *Uttam Chand v. Dhanpat Rai*, (1911) P.L.R. 102=9 I.C. 816.

7. *Ahmed v. Latta*, (1905) 28 All. 238. See page 464 *supra*.

Fraud.

siderable prolongation of these proceedings, is in our opinion undesirable. We think that application for the setting aside of sale should, so far as the procedure applicable to them is concerned, stand on the same footing whether they are based on the ground of irregularity or on the ground of fraud."

In *Paresh Nath v. Hari Charan Dey*,¹ Jenkins C. J. said "The word 'fraud' is very loosely used in this class of cases, any irregularity is taken to be fraud with the consequence that such a finding involves. But a finding of fraud should be reserved for what is dishonest and morally wrong. And it is not sufficient to come to a vague general finding of fraud; actual fraud must be established."

A person alleging fraud must state in detail the facts constituting the fraud and mere want of diligence is not fraud.² Where by an agreement made out of Court the decree-holder received from some of the co-owners of a Zamindari their proportionate parts of the debt and consented to release their shares therein but after the sale was accordingly held, the decree-holder colluded with other co-sharers, had the sale set aside and in a resale, the whole Zamindari was sold, the Judicial Committee said "If it means anything, it can only mean that the judgment-creditor broke his alleged agreement with the plaintiff and that the other persons alleged to have been implicated, being aware of the circumstances, took some part in the transaction" and that charge was, as it was, vague and general.³ The allegation of fraud recites usually collusion between the decree-holder and

1. (1911) 38 Cal. 622.

2. *Babudas v. Muhammad Yusuf*, (1921) 6 Pat. L. J. 319= 61 I. C. 823.

3. *Prosunno Kumar v. Kali Das*, (1892) 19 Cal. 683 (688).

auction-purchaser and in keeping out the proceedings in execution and sale from the knowledge of the judgment-debtors.¹ A purchase by the decree-holder through a benamidar at a price less than that at which he was permitted to bid constitutes fraud.² So is a purchase by a clerk of the decree-holder's pleader.³ A statement in the proclamation that the property admitted for sale was non-ancestral is not.⁴ A charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him. But where the decree-holder had withheld information of an agreement to sell to a third person the property after court-sale for a specified sum, the omission to disclose the agreement when he applied for leave to bid was a fraud on the Court and entitled the petitioner to have the sale set aside on the ground that in point of law no leave to bid had been granted.⁵ Where the decree-holder agreed not to hold the sale if payment was made within a certain time, and he then fraudulently proceeded to sell the property, this is fraud in the conduct of the

1. *Hira Lal v. Chundra Kanto*, (1899) 26 Cal. 539. (In that case the applicant may be entitled to the extension of time under S. 18 of the Limitation Act); *Gulam Ahad v. Judhister Chundra*, (1902) 30 Cal. 142 (153); *Durga Kunwar v. Balwant*, (1901) 23 All. 478.

2. *Srimati Sarat Kumari v. Nimalicharan*, (1900) 5 C. W. N. 265; *Nanda Kumar v. Govind*, (1910) 13 C. L. J. 312=6 I.C. 135; *Raj Kuar v. Chunnoo Lal*, (1923) 16 O. C. 86=75 I. C. 888.

3. *Ali Abbas v. Narain Dass*, (1925) Oudh, 381=87 I.C. 997.

4. *Wahid unnissa v. Girdhari*, (1905) 17 All. 702.

5. *Mohamed Mira v. Savvasi Vijaya*, (1899) 23 Mad. 227 P.C. (The rule in *Woopendra Nath v. Brojendronath*, (1881) 7 Cal. 346 is too broadly stated). See also *Tarubala v. Mani Lal*, (1909) 1 I. C. 246; *Uttam Chand v. Dhanapat Rai*, (1911) P. L. R. 102=9 I.C. 816.

Fraud.

sale.¹ An under-statement of value in a sale-proclamation is not by itself sufficient to justify an inference of fraud. If the other circumstances of the cases justify an inference that the under-statement was deliberately made as part of a scheme to obtain the property at a low price the under-statement taken with those circumstances may perhaps justify a finding of fraud.²

Publishing
and conduct-
ing the sale.

The irregularity or fraud must have occurred in publishing or conducting the sale. The expression "publishing the sale" refers to all acts required to be done preliminary to the conduct of the sale. The irregular preparation of the sale-proclamation, the omission to issue the notice required by rule 66 (2) and the failure to comply with the provisions of rule 54 regarding promulgation of the order are irregularities in publishing the sale.³ The expression 'conducting the sale,' relates to the action of the officer conducting the sale,' and not to anything done before the sale or any proceedings unconnected with the actual carrying out of the sale.⁴ It embraces all acts which the Court is required to perform down to the close of the sale which terminates when the lot is knocked down to the highest bidder.⁵

1. *Sheikh Bux v. Raghubar Ganjhu* (1918) 3 Pat.L.J. 645=48 I.C. 560.

2. *Kishori Dasi v. Mukund Lal*, (1911) 15 C. W. N. 896=11 I. C. 295; *Ramdhari v. Deonandan*, (1924) 2 Pat. 65; *Surai Narain v. Hardwar Singh* (1925) Pat. 461=87 I.C. 381. See also *Tarubala v. Moni Lal*, (1909) 1 I. C. 246; *Bajrang v. Mt. Sonelhari*, (1925) Pat. 521=85 I.C. 622.

3. *Bepin Bihari v. Kanti Chandra*, (1913) 18 I.C. 715. See also *Gopi Chand v. Benarsi Das*, (1919) 53 I.C. 794.

4. *Ramachhaibar v. Bechu*, (1885) 7 All. 641.

5. *Binda Debee v. Gopee Soondurce*, (1861) 6 W.R. Mis. 82.

So any irregularity prior to the publication and sale cannot be a ground under this rule. An objection that the decree in execution of which the sale was held was obtained by fraud,¹ or without service of summons or notice on the judgment-debtor,² or was time-barred or was allowed after the decree was satisfied,³ or an objection that the property sold was not saleable within the meaning of section 60,⁴ or was sold by a Court which had no jurisdiction,⁵ cannot be entertained under this rule. Grounds outside the rule.

According to the Allahabad High Court an omission to attach immoveable property before sale amounts to a material irregularity in "conducting the sale" for an attachment is a step towards the sale of the judgment-debtor's property.⁶ But according to the High Court of Calcutta an attachment is not an essential preliminary in sales, but only a measure for the protection of the decree-holder

1. *Khagendra v. Pran Nath*, (1902) 22 Cal. 395; *Lakshmi Charan v. Srish Chandra*, (1911) 13 C.L.J. 162=9 I.C. 584; *Venkatarama v. Paramasiva*, (1924) 78 I.C. 108.

2. *Nett Lall v. Sheikh Kareem*, (1896) 23 Cal. 686.

3. *Gangathara v. Rathabai*, (1883) 6 Mad. 237; *Lakhu Rai v. Keshi Prasad*, (1917) 2 Pat. L.J. 157=38 I.C. 876; *Alkeshi Dasi v. Biraj Mohini*, (1911) 10 I.C. 625; *In re Degumburee*, (1862) 9 W.R. 230 F.B.

4. *Ramachhaibar v. Bechu*, (1885) 7 All. 641; *Umed v. Jas Ram*, (1907) 29 All. 612; *Sakhi Rai v. Ram Autar*, (1920) 1 Pat. L. T. 742=57 I. C. 261. See also *Durgacharan v. Kali Prasanna* (1899) 26 Cal. 727; *Ramagopal v. Khiali Ram*, (1884) 6 All. 448.

5. *Shirin Begam v. Agha Ali*, (1895) 18 All. 141 (144).

6. *Sheodhyan v. Bholanath*, (1899) 21 All. 311; *Madho Lal v. Jawahir*, (1909) 6 I. C. 713=40 P. R. 1909; *Panaru v. Baldeo* (1913) 21 I. C. 46; *Taraknath v. Syamacharan*, (1916) 36 I. C. 292. But see per Mahmood J. in *Ramchaibar v. Bechu*, (1885) 7 All. 641, saying that conducting the sale does not refer to anything done antecedent to sale.

and the purchaser of property and the absence of attachment was not a tenable objection.¹

Injury.

Injury means loss what is wrongful, and when a person loses what he has been in the habit or wrongfully gaining, it is not substantial injury or injury of any sort or kind. So a Court of justice in a proceeding arising under section 311 should not take *abwabs* into account in fixing the value of the property.²

Connection
between
irregularity
and injury.

Material irregularity or fraud is not by itself a ground for setting aside a sale, unless the applicant suffered substantial injury.³ From the existence of a material irregularity or fraud we cannot presume substantial injury.⁴ Under certain circumstances

1. *Sharoda Moyee v. Wooma Moyee*, (1867) 8 W. R. 9; *Patitshahu v. Hari Mahanti*, (1900) 27 Cal. 789; *Sasirama Kumari v. Meherban*, (1911) 13 C. L. J. 243=9 I. C. 918; *Samiruddin v. Abdul Syed*, (1918) 44 I. C. 734; *Tarakanath v. Syamacharan*, (1916) 36 I. C. 292; *Shanker Rao v. Mawk Rao*, (1923) Nag. 18=68 I. C. 843; *Raja Wazir Singh v. Bhokhari Singh*, (1923) 3 Pat. L. T. 765=68 I. C. 363. In *Macnaghten v. Mahabir*, (1882) 9 Cal. 656 (665) P. C. the question, whether the notice of attachment not having been properly published would affect the sale or be an irregularity in conducting the sale, was not decided.

2. *Shosi Bhusan v. Ahmed*, (1903) 7 C.W.N. 439.

3. *Ranglal v. Sir Rameswar*, (1912) 39 Cal. 26 P. C.; *Mahomed Ali v. Kiberia*, (1911) 15 C.W.N. 350=9 I. C. 66; *Mohamed v. Sayed Ali Khan*, (1914) 25 I.C. 18 (absence of fresh proclamation); *Sham Sundar v. Jhumat*, (1911) 20 C. L. J. 337=11 I.C. 893. (omission to give notice under O. 21 rule 22); *Rasaraaj v. Prosanna Kumar*, (1913) 40 Cal. 45; *Tekait Krishna Prasad v. Moti Chand*, (1913) 40 Cal. 635 P.C. (irregularity in proclaiming sale); *Mahmud Ali v. Gobind*, (1915) 18 O.C. 1=28 I.C. 134 (omission to specify time of sale); *Amrit Lal v. Jagatchandra*, (1925) 4 Pat. 696; *Muzaffarnigas v. Budh Singh*, (1924) All. 698=83 I.C. 1028.

4. *Macnaughten v. Mahabir*, (1882) 9 Cal. 656 P.C.; *Satish Chunder v. Thomas*, (1885) 11 Cal. 658; *Lala Mobaruk v. Secretary of State*, (1885) 11 Cal. 200 F.B.; *Arunachellam v. Arunachellam*, (1889) 12 Mad. 19 P.C. See also *Olpherts v. Mahabir*, (1882) 9 Cal. 656 P.C.; *Tasadduk v. Ahmad*, (1894) 21 Cal. 66 P.C.

there may be a necessary inference of substantial loss on account of an irregularity, but inadequacy of price cannot be the sole ground to conclude that the one is the cause of the other.¹

Connection
between
irregularity
and injury.

The substantial injury must have arisen by reason of the material irregularity or fraud complained of.² Substantial injury may be due to various causes and not necessarily to material irregularity in the publication and conduct of the sale. But Courts are enjoined to exclude all other causes of substantial injury and confine the ground of relief to the presence of the relation of cause and effect between irregularity and substantial injury.³ The injury must at least flow reasonably and naturally from the irregularity and be attributable to it alone.⁴

1. *Ganapathi Pillai v. Malaya Perumal*, (1924) 20 L.W. 736 ; *Nibaran Chandra v. Chiranjib*, (1906) 32 Cal. 542 ; *Venkatasubbayya v. Zamindar of Karvetnagar*, (1897) 20 Mad. 159 ; *Haladhar v. Prafullanath* (1920) 57 I.C. 892 ; *Superior Bank Ltd., v. Budh Singh*, (1924) All. 698 ; *Sher Khan v. Misrilal*, (1925) 89 I.C. 107.

2. *Macnaughten v. Mahabir*, (1882) 9 Cal. 656 P.C.; *Satish Chunder v. Thomas*, (1885) 11 Cal. 658 ; *Fazlar v. Javalur*, (1911) 9 I.C. 385 ; *Gour Kishore v. Chandra Mohan*, (1912) 16 I.C. 394 ; *Asmutunnissa v. Ashruff*, (1888) 15 Cal. 488 ; *Bommayya v. Chidambaram*, (1899) 22 Mad. 440 ; *Joytara v. Mahomed*, (1865) 2 W.R. Mis. 2 ; *Nilmonee v. Ramachurn*, (1866) 6 W.R. Mis. 45 ; *Aobol Mahomed v. Sihb Doolaree*, (1869) 11 W.R. 114 ; *Lackram v. Mohesh*, (1869) 12 W.R. 488 ; *Najmooddeen v. Abdul Azeez*, (1869) 11 W.R. 95 ; *Chunder Shekhna v. Jadub Chunder*, (1873) 19 W.R. 78 ; *Sheo Prokash v. Hurdai*, (1874) 22 W.R. 550 ; *Sanwul v. Makhun*, (1870) 2 N.W.P. 143 ; *Maung Kun v. Ma Nan*, (1922) 70 I.C. 900 ; *Sethai Goundan v. Subramania*, (1920) 11 L.W. 477.

3. *Nibaran Chandra v. Chiranjib Prasad*, (1906) 32 Cal. 542.

4. *Tripurasundari v. Durga Churn*, (1884) 11 Cal. 74 ; *Swaminatha v. Sivagurunatha*, (1916) 32 I.C. 990 ; *Palaniappa v. Arumuga*, (1916) 33 I.C. 692 ; *Haladhar v. Prafullanath*, (1920) 57 I.C. 892 ; *Laxmi Narayan v. Purnabai*, (1918) 48 I.C. 611 ; *Mohamed Ali v. Mahabir*, (1916) 35 I.C. 411 ; *Sivakolundu v. Ganapathy*, (1917) M.W.N. 89=37 I.C. 464 ; *Maniram v. Luchman Das*, (1917) P.L.R. 11=39 I.C. 59 ; *Taimuddi v. Lakpat*, (1918) 45 I.C. 212 ; *Srish Chandra v. Sadhu Charan*, (1918) Pat. 284=46 I.C.

When the value shown in the proclamation was inserted by consent the fact that the price actually got at the sale was lower is not sufficient to set aside the sale.¹

Direct
evidence.

The nature of the evidence necessary to prove this connection has been the subject of varying judicial opinion. Under the C.P. Code of 1882, "no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." In *Tasadduk v. Ahmed*,² the sale was sought to be set aside on the ground that it was held before the expiry of thirty days from the date of the proclamation and their Lordships said, "In the application of that section 311 it was incumbent on the respondents (applicants) to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence and it would be extremely improbable that injury could have happened from the non-compliance with the strict letter of section 290. Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions of section 290. The section clearly contemplates direct evidence on the subject."³

84 ; *Noor Mahomed v. Malik*, (1923) Lah. 213 = 71 I.C. 730; *Maung Kun v. Ma Nan*, (1922) 4 U.B.R. 97 = 70 I.C. 900 ; *Paresh Nath v. Haricharan*, (1919) 52 I.C. 23 ; *Mahomed Maqbul v. Sayed Ali*, (1914) 25 I.C. 18 ; *Gour Kishore v. Chandra Mohan*, (1912) 16 I.C. 394.

1. *Rajbans Sahay v. Askaran Baid*, (1922) 1 Pat. 214 ; *Shcr Khan v. Misri Lal*, (1925) 89 I.C. 107.

2. (1894) 21 Cal 66 P.C.

3. See also *Olpherts v. Mahabir Pershad*, (1882) 9 Cal. 656. P.C. ; *Arunachellam v. Arunachellam*, (1886) 12 Mad. 19 P.C. ; *Jagannath v. Makund*, (1895) 18 All. 37 ; *Mobaruk v. Secretary of*

Referring to these words 'direct evidence,' the High Court of Calcutta said in *Ismail Khan v. Abdul Aziz*,¹ "we think that it is very doubtful whether their Lordships by use of these words intended to restrict the mode of proof connecting a material irregularity with substantial injury to evidence of a particular description or to vary the rule laid down in the cases of *Mac Naughten v. Mahabir Pershad*,² and *Arunachellam v. Arunachellam*,³ that in all cases of irregularity under Section 311, evidence must be given of substantial injury having resulted from the irregularity. We are rather inclined to think that what their Lordships intended to say by using the words 'direct evidence' was that there must be evidence showing that substantial injury was the necessary result of the irregularity complained of..... No doubt, there is no direct evidence in the strict sense of the term that the inadequate price was caused by the irregularity, still there is evidence from which we think the inference necessarily arises that the irregularity was the cause of the injury. The uncertainty as to when and at what particular hour the sale would be held was sufficient to prevent intending purchasers from being present on the 25th November and on the 27th when the property was put up and sold only three bidders attended and to the paucity of bidders, we think may reasonably be ascribed the very low price the

Direct
evidence.

State, (1884) 11 Cal. 658; *Esmail v. Abdul Aziz*, (1905) 1 C.L.J. 91. This is a pure question of fact; *Fakharuddin v. Official Trustee*, (1881) 8 Cal. 178.

1. (1905) 32 Cal. 509. See also *Baij Nath v. Maharaja Sir Ravanewar Prasad*, (1907) 6 C.L.J. 163 (inadequate price); *Venkata Subbaraya v. Zamindar of Karvetnagar*, (1897) 20 Mad. 159 (absence of tom-tom at the sale).

2. (1883) 9 Cal. 656.

3. (1889) 12 Mad. 19.

Direct
evidence.

property fetched." Therefore the fact that the inadequacy of price is the result of irregularity may be established by direct evidence, or be inferred, when such inference is reasonable from the nature of the irregularity and the extent of the inadequacy of price.¹ That is, there must be evidence of circumstances, which will warrant the necessary or at least reasonable inference that the inadequacy of price at the sale was the result of the irregularity complained of.² The same view has been taken by the Madras High Court.³ But the Allahabad High Court took a more narrow view that it was incumbent on the judgment-debtors to prove that they sustained substantial injury by reason of such irregularity and that loss was not to be inferred from the mere fact that a sale was held without full compliance with section 290, a section which contemplated direct evidence on the subject.⁴

To set at rest this conflict of views the language of the Code has been now altered. It is not sufficient to set aside a sale if "upon the facts proved the

1. *Sheorutton v. Net Lall*, (1902) 30 Cal. 9; *Surno Moyee v. Dakhina*, (1897) 24 Cal. 291; *Duni Chand v. Atma Singh*, (1906) 132 P.R. 1906=11 P.L.R. 1907; *Zaki Hasan v. Sambhu Dayal*, (1902) 6 O. C. 61; *Guru Baksh v. Jawahir*, (1893) 20 Cal. 599; *Jamini Mohan v. Chandra Kumar*, (1901) 6 C.W.N. 44; *Hem Chandra v. Sarat Kamini*, (1902) 6 C.W.N. 526; *Moti Lal v. Bhawani Kumari*, (1902) 6 C.W.N. 836; *Bhikari v. Rani Surjamoni*, (1902) 6 C.W.N. 48; *Bonomali v. Woomesh Chunder*, (1881) 7 Cal. 730; *Gopi Koeri v. Gopi Lal*, (1894) 21 Cal. 806.

2. *Mahabir Pershad v. Dhanukdhari*, (1904) 31 Cal. 815 (819) (non-specification of the hour of sale).

3. *Venkatasubbaraya Chetty v. Zamindar of Karvetnagar*, (1896) 20 Mad. 159 (omission to have sale tom-tom); *Bommoyya v. Chidambara*, (1899) 22 Mad. 440 (non-publication of the notice of sale at the Collector's office).

4. *Jagannath v. Makund Prasad*, (1895) 18 All. 37; *Shirin v. Agha Ali*, (1895) 18 All. 141.

Court is satisfied that the applicant has sustained substantial injury, by reason of such irregularity or fraud" and the relation between the injury and the low price need not be connected as cause and effect by direct evidence.

The person who seeks to set aside the sale must prove that there was material irregularity and substantial injury resulted from it.¹

The application must be made to the Court executing the decree and not to the collector to whom a case has been transferred for execution,² unless the rules framed by the Local Government allow the collector to entertain such application.³ The preamble of the application need not set out a formal array of parties.⁴ Separate applications by different judgment-debtors may be tried together and where separate applications are made by different judgment-debtors and some are barred, they may be treated as applications to be made parties to proceedings then before the Court and the sale as a whole may be set aside.⁵

The decree-holder is a necessary party to an application under this rule. So where the judgment-debtor applies and does not implead the decree-holder until long after period of limitation had expired, the application must be dismissed.⁶ Beneficial

Form of application.

Parties.

1. *Ganapathia Pillai v. Malayaperumal*, (1924) 20 L.W. 736; *Arup Chand v. Mt. Karval Chand*, (1924) Lah. 592.

2. *Narayan v. Rasul Khan*, (1899) 23 Bom. 531.

3. As in the United Provinces, *Keshabdeo v. Radha Prasad*, (1889) 11 All. 94.

4. *Ghazafar Husain v. Ramratan*, (1915) 17 O. C. 306=25 I. C. 907.

5. *Rudrananda v. Prithi Chand*, (1911) 16 C. W. N. 704=11 I.C. 438.

6. *Ali Gauhar v. Bansidhar*, (1893) 15 All. 407. See also *Karamat v. Mir Ali*, (1891) A.W.N. 121.

owners are not necessary parties. The sale can be set aside finally and conclusively as against the beneficiary although the benamidar only is a party to the proceeding and notwithstanding the applicant to set aside the sale is aware of the benami purchase.¹

Under the Code of 1882 there was a conflict of opinion whether the auction-purchaser was or was not a necessary party.² It was held by the Calcutta High Court that a transferee from an auction-purchaser is a necessary party to a proceeding for the reversal of an execution sale, when such proceeding is commenced after the transfer has been effected.³ When an auction-purchase is made by an executor of the deceased judgment-debtor in his personal capacity, he should not be debarred from applying under this rule in this capacity.⁴

Notice.

Under the present Code no order can be made until notice of the application is given to all persons affected thereby,⁵ so that the auction-purchaser and his transferee are now necessary parties to the application to set aside a sale.⁶ An order setting aside an execution sale without giving proper notice to all parties as required by this rule is without jurisdiction.⁷

1. *Baroda Kanta v. Chunder Kanta*, (1902) 29 Cal. 682 ; *Ramanujacharya v. Conjeevaram Dharmarakshana Nidhi*, (1914) 1 L.W. 412=24 I.C. 44

2. *Karamat v. Mir Ali*, (1891) A.W.N. 121 ; *Surendra Mohini v. Amararesh Chandra*, (1912) 39 Cal. 687; *Ghazaffar v. Lala Ram*, (1915) 17 O.C. 306=25 I.C. 907.

3. *Menajjidi v. Toam Mandal*, (1911) 39 Cal. 881.

4. *Makaraj Bahadur Singh v. Surendra Narayan*, (1915) 19 C.W.N. 152=28 I.C. 893

5. C.F.C., O. 21 r. 90 (2).

6. *Ajuddin v. Khoda Bur*, (1919) 50 I.C. 5 ; *Menajuddin v. Toam Mandal*, (1911) 39 Cal. 881 ; *Sumitra Kuer v. Damri Lal*, (1921) 2 Pat. L.T. 386=62 I.C. 61.

7. *Bhikkar Gir Gossain v. Jalpadat*, (1921) 2 Pat. L.T. 270=62 I.C. 113.

An application to have an execution sale set aside was made within the time allowed by law. In that application the number of the execution case was given and certain of the decree-holders auction-purchasers were mentioned. The names of four of the decree-holders were not mentioned but notice was subsequently served on them of the application. It was held, that it was not necessary that notice of the application should be served on all persons affected by the sale within 30 days of the sale, because rule 92 merely provides that no sale shall be set aside until notice has been issued to all persons affected by it, but there is no limitation provided for giving such notice.¹

Under the Code of 1882 an application to set aside sale was confined to material irregularity and other grounds such as fraud did not fall within the section 311.² Where fraud was alleged and substantiated and the question arose between parties to the suit,³ an application, not a separate suit, lay under section 244 (section 47).⁴ The order under section 244 being a decree, a second appeal also lay.⁵ Appeal.

1. *Abdur Raman v. Babu Har Narain Das*, (1922) Oudh 129 = 68 I C. 238.

2. *Umbika Churn v. Dwarka Nath*, (1867) 8 W. R. 560 ; *Nund Lal v. Dilawar*, (1867) 11 W. R. 244 ; *Raghubans v. Phool Kumari*, (1905) 32 Cal. 1130 (1140).

3. In *Roy Luchmeeput v. Aditya Churn*, (1875) 24 W.R. 452, the application was by a third person.

4. *Prosumo Kumar v. Kali Das*, (1892) 19 Cal. 683 P. C.; *Mohandro v. Gopal* (1890) 17 Cal. 769 must be taken to have been overruled ; see *Bhubon v. Nunda Lal*, (1894) 26 Cal. 324 ; *Rajoni Kant v. Hossain*, (1899) 4 C.W.N. 538 ; *Adhar v. Monmotha Nath*, (1901) 6 C.W. N. 279; *Debendra Nath v. Prasanna Kumar*, (1907) 5 C. L. J. 328.

5. *Bhubon v. Nunda Lal*, (1894) 26 Cal. 324 ; *Hara Lal v. Chundro Kanto*, (1895) 26 Cal. 539 ; *Nemai Chaud v. Deno Nath*, (1898) 2 C. W. N. 691 ; *Kokil Singh v. Edul Singh*, (1904) 31 Cal. 385.

Under the present Code, applications to set aside sale on the ground of fraud in publishing or conducting sales, fall under Order 21 rule 90,¹ and an appeal is allowed against an order made under this rule by Order 43, rule 1.² No second appeal therefore lies in cases of fraud as in cases of material irregularity whether the application is dismissed for default, or whether the order grants or refuses the application, because the order is no longer one made under section 47, but under Order 21 rule 90.³ On this, therefore, only one appeal is allowed, though the Court purports to deal with the application under section 47.⁴ If the case is one which calls for further consideration, the High Court can enter-

1. See *Rhodes v. Padmanabha*, (1914) M. W. N. 92=26 I. C. 369 ; *Jagannath v. Daud*, (1923) 4 Lah. 243.

2. *Luchman Lal v. Padarath Singh*, (1924) 4 Pat. L.T. 735=74 I.C. 594 ; *Sheo Prasad v. Mossamat Prema*, (1918) 15 A. L. J. 920=43 I.C. 522.

3. *Sita Nath v. Hari Krishna*, (1910) 6 I. C. 573 ; *Bhadreswar v. Bishun Charan*, (1910) 8 I. C. 3 ; *Bissonath v. Komalashwari Prasad*, (1919) 9 I. C. 135 ; *Benode Behari v. Ramsarup*, (1912) 16 C. W. N. 1015=15 I. C. 679 ; *Nilmoni v. Brinda*, (1912) 16 I. C. 436 ; *Lal Bihari v. Nagendranath* (1912) 22 C.L.J. 266=16 I. C. 690 ; *Maung Shwe v. Maung Shwe*, (1916) 11 Bur. L. T. 26=39 I. C. 374 ; *Shri Krishna v. Ramsaran*, (1920) 1 Pat. L. T. 267=56 I.C. 646 ; *Sheo Prasad v. Prema Kuar*, (1918) 40 All. 122 ; *Mahadeo v. Dhobi Singh*, (1923) 2 Pat. 916 ; *Baidyanath v. Prabhabati*, (1924) Pat. 803=78 I.C. 315.

4. See O. 43 r. 1 cl. (j), and S. 104 (2) ; *Anantharama Iyer v. Vellath Kuttimalu*, (1916) 30 M.L.J. 611=34 I.C. 829 ; *Sheikh Mula v. Raghubar*, (1918) 3 Pat. L. J. 645=48 I.C. 560 ; *Sheo Prasad v. Prema Kuar*, (1918) 40 All. 122 ; *Girindra Kishore v. Nanda Lal*, (1913) 28 I. C. 63 ; *Brojosundar v. Moti Lal*, (1910) 13 C. L. J. 153=5 I. C. 493 (dismissed for default) ; *Parja Mal v. Mul Chand*, (1925) 6 Lah. 250 (application dismissed as barred by time). *Nabin Chandra v. Bipin Chandra*, (1925) 87 I. C. 555. See *Kamana Venkataswami v. Godavarti Nagayya*, (1925) Mad 1142=87 I. C. 413, where it was held S. 47 applied and second appeal lay.

tain a revision.¹ No second appeal lies against an appellate order confirming an order refusing to set aside a sale on the ground of fraud.² Nor does an appeal lie from the order of the first appellate Court under the Letters Patent.³ Where the sale was under the old Code, and the application to set it aside was under the old Code, but the decision was given while the new Code was in force, it was held that the new Code applied and no second appeal lay.⁴ An order of the High Court refusing to set aside an execution sale is a final order and is appealable to the Privy Council.⁵

An application for setting aside an execution-sale is not an application for execution but in the nature of an original proceeding which is not excluded from the purview of section 141 of C. P. Code.⁶ Such an application if dismissed for default can be restored, under Order 9 rule 9, especially where the remedy by review or by suit is not open to the applicant.⁷ But when the application for res-

1. *Dorairaja v. Veeranan*, (1910) 19 M.L.J. 171=8 I.C. 883; *Srish Chandr v. Satha Charan*, (1818) 5 Pat. L.W. 15=46 I.C. 84; *Fazlar Rahman v. Jawahir Singh*, (1911) 9 I.C. 383.

2. *Raj Mohin v. Gobinda Chandra*, (1912) 17 C. W. N. 524=14 I. C. 53.

3. *Naimullah v. Ishanullah*, (1892) 14 All. 226 F.B.; *Piari v. Masun*, (1916) 39 All. 191; see *Nagendra Nath v. Rakhal Das*, 1925) Cal. 570=79 I.C. 357.

4. *Bhadreswar v. Bishun Charan*, (1910) 8 I. C. 3.

5. *Tekait Krishna Prasad v. Moti Chand*, (1913) 40 Cal. 635.

6. See *Jagdish v. Sureshwar*, (1921) 6 Pat. L. J. 253=62 I. C. 608.

7. *Deljan v. Hemantakumar*, (1915) 19 C. W. N. 758=29 I. C. 395; *Bhuban Behari v. Dhirendranath*, (1916) 20 C. W. N. 1203=33 I.C. 581; *Gauri v. Hinga*, (1921) 23 O. C. 349=59 I. C. 575; *Issar Singh v. Udhav Das*, (1925) 83 I.C. 749.

Contra *Bhubaneswar Prasad v. Tilakdhari*, (1919) 4 Pat. L.J. 135=49 I. C. 617 F. B.; *Babu Jugal Kishore v. Bachinder Mohan*,

toration is dismissed, it is doubtful whether a second application can be preferred for the same purpose.¹ An order refusing to set aside an order of dismissal for default is not appealable.² A decree-holder took every proceeding under the Code to give effective power to the Court to sell the property and when on the date fixed for sale, the Court refused the decree-holder's application to drop the execution and sold the property and the District Court set aside the order, it was held that the order was not appealable, that the only Court that could set it aside was the High Court and that the lower Court having assumed jurisdiction in the matter, a second appeal was competent and the order of the lower appellate Court was set aside as without jurisdiction.³

An appeal lies even though the purchaser is not the decree-holder but a stranger.⁴

It is only where the fraud is in publishing and conducting the sale that this rule applies. Where

(1919) 52 I. C. 416; *Kalikanta v. Shyam Lal*, (1917) 25 C. L. J. 163=38 I. C. 598; *Gauri v. Hanga*, (1921) 23 O.C. 349.

See also *Kali Shettathi v. Shamarau*, (1917) 5 L. W. 124=37 I. C. 229; *Ritu Kuer v. Alakhdeo*, (1918) 4 Pat. L. J. 330.=47 I. C. 154.

1. *Paresh Nath v. Hari Charan*, ((1911) 38 Cal. 623.

2. *Charan Chandra v. Chandi Charan*, (1915) 19 C.W.N. 25=27 I. C. 492 (The law under the Code of 1882 has not been changed); *Bhuben Behari, v. Dhirendra*, (1916) 33 I. C. 581; *Kalikanta v. Shyam Lal*, (1917) 25 C. L. J. 163=38 I. C. 598; *Ambica Charan v. Esmail*, (1920) 56 I. C. 981. See contra *Narendranath v. Rakhal Das*, (1924) 79 I. C. 351; *Dhirendra Narain v. Narendra Narain* (1924) 80 I. C. 678 (where previous authorities were not cited and application was held to be under Order 21 rule 90. For cases under the earlier law, see *Ninyappa v. Gangawa*, (1886) 10 Bom. 433; *Raja v. Srinivasa*, (1888) 11 Mad. 319; *Ghasiti Bibi v. Abdul Samad*, (1907) 29 All. 896; *Sujauddin v. Reazuddin*, (1900) 27 Cal. 414; *Jury Bahaden v. Mohadeo Prasad*, (1904) 31 Cal. 207.

3. *Maheshkanta v. Subai Gope*, (1920) 57 I.C. 396.

4. *Lakshminarasima v. Lakshmanan*, (1911) 12 I. C. 164.

the transferee from the judgment-debtors sought to set aside the sale alleging collusion between the judgment-debtor and the decree-holder and charging that the decree had been satisfied before the sale and that the execution application of the decree-holder was barred by limitation, it was held that it was under section 47 and a second appeal lay.¹

The sale can be avoided only by an application made before confirmation and after confirmation the purchaser, whether the purchaser be a stranger or the mortgagee himself, obtains an indefeasible title and the right of the mortgagor and his representatives is absolutely extinguished,² and the judgment-debtor cannot after confirmation of the sale plead such irregularities by way of defence to a suit by the purchaser for possession.³ But if the application is made after confirmation, the applicant has to prove further that owing to fraud or other reasons, he was kept in ignorance of the sale and the proceedings preliminary to sale.⁴

Application must be before confirmation.

A party who does not raise an objection to the proclamation when he ought to have raised and

Estoppel.

1. *Ram Dhan v. Tapi*, (1913) 18 C. L. J. 265=21 I. C. 938; *Alokeshi v. Biraj Mohini*, (1911) 10 I. C. 625. See also *Maung Po v. Annamallay*, (1910) 9 I. C. 452.

2. *Ashutosh v. Behari Lal*, (1907) 35 Cal. 61 F. B.; *Dhurni Kota v. Budharaja*, (1907) 30 Mad. 362; *Muthu v. Kuruppan* (1907) 30 Mad. 313; *Kishna v. Umrao* (1908) 30 All. 146; *Lal Bahadur v. Abharan*, (1914) 37 All. 165; F.B. *Sheo Narain v. Ram Jatan*, (1917) 2 Pat. L. J. 58=41 I. C. 533; *Arjuna Reddi v. Venkatachala Asari*, (1916) 32 M. L. J. 525=32 I. C. 611; *Mehr Baksh v. Sanjhe Khan*, (1915) P. W. R. 194=33 I. C. 802; *Tikati Dal v. Christian*, (1915) Pat. 92=50 I. C. 472. See however *Pancham Lal v. Kishun Pershad*, (1910) 12 C. L. J. 574=6 I. C. 47; *Mehr v. Sanjhe*, (1916) P. R. 18; *Bhaickand v. Ranchhoddas*, (1920) 22 Bom. L. R. 670; *Sher Khan v. Misri Lal*, (1925) 89 I. C. 107.

3. *Jagneswar v. Kailashchandra*, (1925) Cal. 81=78 I. C. 126.

4. *Ashutosh v. Behari Lal*, (1907) 35 Cal. 61 F. B.

there by fails in the duty which he owes to the Court should be held to be estopped from complaining of an irregularity resulting from an erroneous statement which he should have corrected.¹ If the judgment-debtor allows the sale to be confirmed without objecting on the ground afterwards alleged by him, say, insufficiency of description within the requirements of section 287, he having been throughout aware of what the description was, the sale is not invalid on that ground alone without more. "It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant, that they should take no notice of that, allow the sale to proceed and then come forward and say the whole proceedings were vitiated.² Where on the day fixed for sale, the judgment-debtor applied for time for payment of the decree-amount but afterwards contested the legality of the sales, it was held he was estopped, for he asked for time and bound himself not to contest the validity of the sale, provided he got time." Even where the judgment-debtor obtained

1. *Raja of Kalahasti v. Maharajah of Venkatagiri*, (1913) 38 Mad. 387. See also *Subbaraya v. Muthammal*, (1914) 22 I.C. 780; *Shrikrishna v. Ranisaran*, (1920) 1 Pat. L.T. 267=56 I.C. 646; *Swaminatha v. Sivagurunatha*, (1916) 32 I.C. 990.

2. *Arunachellam v. Arunachelam*, (1889) 12 Mad. 19 P.C.; *Mac Naghten v. Mahabir Prasad*, (1882) 9 Cal. 652 (601) P.C.; *Girdhari Singh v. Hurdeo*, (1898) 3 I.A. 230; *Shersingh v. Dayaram*, (1891) 13 All. 564 (568); *Behari Singh v. Mukat Singh*, (1906) 28 All. 273; *Rajah of Kalahasti v. Maharajah of Venkatagiri*, (1913) 38 Mad. 387.

an adjournment of sale upon the condition that no fresh proclamation was to be issued and that he will not raise any objection on the ground of irregularity or inadequacy of price such a submission on the part of the judgment-debtor would however be no waiver of fraud and he is entitled to have his allegation of fraud fully investigated.¹ But where the want of objection on the part of the judgment-debtor was due to a mistake² or when he did in fact object to the mis-description of the property³ the judgment-debtor should not be held to be estopped from objecting to the sale on the ground of material irregularity.⁴

A waiver is an intentional relinquishment of a right or such conduct as warrants an inference of the relinquishment of such right and there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which would enable him to take effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed and that the effect of his action will be to confirm it. The burden of proof of knowledge is on the person who relies on the waiver and such knowledge must be plainly made to appear. A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. The right of waiver is subject to the control of public policy which cannot be contravened by any conduct or agree-

1. *Ambika Prasad v. R.H. Whitewell*, (1907) 6 C.L.J. 111.

2. *Uttam Chandra v. Khetra Nath*, (1901) 29 Cal. 577. See also *Protap Chunder v. Arathoor* (1882) 8 Cal. 455.

3. *Rajah of Kalahasti v. Maharaja of Venkatagiri*, (1913) 38 Mad. 387.

4. (1900) 4 O.C. 331.

ment of the parties and agreements which seek to waive an irregularity may be void on grounds of public policy or morality. Where it appeared from the proceedings that a judgment-debtor waived objection to an execution sale on the ground of non-issue of proclamation when the sale was adjourned from time to time and on the ground of inadequacy of price as resulting therefrom, he cannot be prevented from attacking the sale on the ground that the sale-proclamation had been fraudulently suppressed and the price was inadequate by reason of the decree-holder's fraud. Whether there was a waiver or not of the rights of the judgment-debtor to object to a sale and if so to what extent, must depend on the circumstances of each individual case. When on the undertaking of the judgment-debtor not to raise any objection on the ground of illegality or irregularity, the sale was postponed, that amounts to waiver.¹ The agreement to waive objection to an execution-sale is valid only when the Court sanctions it. Where the Court withholds the assent the matter is set free and the parties cannot be regarded as bound by the agreement.²

The question of waiver has to be determined, not merely on the language of the particular petition, but with regard to the whole proceedings in the case and particularly with reference to the order made by the Court on the petition.³ A petition for postponement of a sale would not amount to an admission that the publication and proclamation of

1. *Lakshmi Prasanna v. Rajendra Poddar*, (1918) 47 I.C. 831.

2. *Basanta Kumari v. Ram Kanai Sen*, (1911) 13 C.L.J. 192 = 9 I.C. 628.

3. *Dhanukdhari v. Nathimasahu*, (1907) 11 C.W.N. 848 = 6 C.L.J. 62.

sale were irregular. Such an omission to state irregularity on such a petition would not amount to an estoppel.¹ So an omission to mention the irregularity in a previous petition to have the execution transferred to another district is no objection to enquiry into the same by the Court. The judgment-debtor should raise objections as early as may be possible after he came to know of the details of the proclamation, and since proclamations are usually prepared behind his back, the fact that he did not raise them before the proclamation was settled on, does not debar his application.²

The liberty to avoid may be lost by delay or Laches. acquiescence. When the equity of redemption in a major portion of mortgaged property was sold by the mortgagor to third parties and a minor portion to the mortgagee and in execution of a decree for costs and profits against the third parties, the equity of redemption in their hands was brought to sale by the mortgagee and purchased by himself, the third parties, twenty years after such sale, treated the sale to the mortgagee as a nullity and instituted a suit for redemption against the purchasers of the rights of the mortgagee in the property, without making the representatives of the mortgagee parties to the suit, it was held that the sale was only voidable and after a lapse of 20 years the plaintiff could not successfully set up the case that the sale was a nullity.³

The purchaser at a sale in execution of a decree may apply to Court to set aside the sale on the

1. *Thakoor Mahatab v. Leelanand*, (1881) 7 Cal. 613; *Raman v. Kunhayan*, (1893) 17 Mad. 304.

2. *Rajah Ramessur v. Raisham Krissen*, (1901) 8 C.W.N. 257.

3. *Muhammad v. Dilsukh*, (1905) 27 All. 517.

ground that the judgment-debtor had no saleable interest in the property sold.¹ The judgment-debtor must have had no saleable interest at all. That is, there must have been nothing to sell² or the interest was one that could not be sold³ in other words, the property sold turns out to have no existence at all or to be of no saleable value whatever.⁴ The words 'no saleable interest' are intended to embrace the cases in which a purchaser at an execution sale shall be entitled to receive back his purchase money to those in which the judgment-debtor though having an interest, such interest is by provision of law or for some other reasons unsaleable.⁵ Where after the vesting order had been made and property vested in the Official Assignee the property is sold, the purchaser is entitled to have the sale set aside on the ground of no saleable interest; though the Official Assignee may have acquiesced in the sale and is willing to receive the sale proceeds.⁶ This provision is intended for the protection of persons who are innocent and ignorantly purchase valueless property and a person who purchases immovable property, knowing that the judgment-debtor had no saleable interest therein, is not entitled to the benefit of this equitable rule.⁷ There must be the absence of all sale-

1. C.P.C., O. 21, r. 91 = (Old Code, s. 313).

2. *Munna Singh v. Gajadhar Singh*, (1883) 5 All. 577 F.B.

3. *Sant Lal v. Ramji Das*, (1886) 9 All. 167.

4. *Durga Sundari v. Govinda Chandra*, (1883) 10 Cal. 368.

"No saleable value" does not seem to be a correct interpretation.

5. *Munna Singh v. Gajadhar Singh*, (1883) 5 All. 577 F.B.

6. *Dinobundhoo v. Shoshee Mohun*, (1882) 9 Cal. 217. *Ram Soondur v. Shoshe Mohun*, (1882) 11 C.L.R. 389; *Sundarappaiyar v. Arunachalla Chettiar*, (1905) 31 Mad. 493.

7. *Mahabir v. Dhuman*, (1881) 3 All. 527. See also *Dorabally v. Abdool Azeez*, (1879) 5 I.A. 129.

able interest, at the time of the sale.¹ To oust the benefit of this section, a saleable interest in a portion of the property sold² or possessed by one of the judgment-debtors³ or however small it might be⁴ is sufficient ; for there is no warranty that the property will answer to the description given of it.⁵ Where the interest of the judgment-debtor in one of the numbers sold is admitted, it is for the decree-holder to prove that judgment-debtor had no saleable interest in the property sold at all.⁶

The mortgagor has a sufficient subsisting interest for the purposes of this rule, even though a decree for sale is passed in respect of his debt⁷ or the mortgage debt may exceed the value of the property.⁸ After the High Court was established, the writ of fieri facias could not run beyond the local limits of the High Court's original jurisdiction and the sheriff could not under that writ take possession of or sell property in the Mofussal. A sale held by a Mofussal Court during continuation of that writ passed a valid title to the

1. *Sind Bank Ltd. v. Amersi Dyal*, (1924) 78 I.C. 279.

2. *Ram Coomar v. Shushee Bhooshun*, (1883) 9 Cal. 626; *Ram Narain v. Dwarka Nath*, (1899) 27 Cal. 264 ; *Maung Tha Dun v. Chokkalingam*, (1911) 7 Bur. L.T. 233=23 I.C. 383. See also *Birj Mohun v. Rai Uma Nath*, (1892) 20 Cal. 8 P.C.; *Krishnama v. Kandasami*, (1912) 23 M.L.J. 108=15 I.C. 109.

3. *Faizuddin v. Tincowri*, (1895) 22 Cal. 565.

4. *Jahar v. Ramini Debi*, (1900) 28 Cal. 238.

5. *Sundara Gopalan v. Venkatavarada*, (1893) 17 Mad. 228; *Sheo Gobind v. Dhanukdhar*, (1913) 19 C.W.N. 1291 (1297)=21 I.C. 774 ; See also *Shanto v. Nainsukh*, (1901) 23 All. 355 ; *Muhammad Rahmutullah v. Bacheho*, (1905) 27 All. 537.

6. *Krishnama v. Kandasami*, (1912) 23 M.L.J. 108=15 I.C. 109.

7. *Protap Chunder v. Panioty*, (1883) 9 Cal. 506. *Durga Sundari v. Govinda*, (1883) 10 Cal. 368 (372). But see *Naharmul v. Sadut Ali*, (1880) 8 C.L.R. 468.

8. *Sant Lal v. Ranji*, (1889) 9 All. 167.

purchaser.¹ Where a property is sold in execution of a decree, it cannot be sold again at the instance of a decree-holder, who had attached it before the attachment effected by the decree-holder, under whose decree it is actually sold. On the happening of a judicial sale, all previous attachments effected upon the property fall to the ground, so that the judgment debtor will have no saleable interest after the first judicial sale.² The purchaser of an estate in execution of a decree, after default has been made in the payment of revenue for it, but before the revenue sale, cannot in the event of subsequent revenue sale, seek to set aside his purchase on the ground that the judgment-debtor had no saleable interest at the date of sale, for until the revenue sale takes place, the ownership continues in the defaulter.³

Under Order 21 rule 92 C. P. Code “(1) where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. (2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale. Provided that no order shall be made unless notice of

1. *Grish Chunder v. Brojo Jibun*, (1880) 8 C.L.R. 4. See also *Ram Narain v. Dwarka Nath*, (1899) 27 Cal. 264.

2. *Kashi Nath v. Surbanand*, (1885) 12 Cal. 317; *Kedar Nath v. Uma Charan* (1910) 6 C.W.N. 57; *Girdhardas v. Siddhesvari Prasad*, (1917) 40 All. 411. For the law under the Code of 1859, see *Chutka v. Goberdhone*, (1880) 6 C. L. R. 85; *Abhoy Churn v. Golam Ali*, (1886) 7 Cal. 410.

3. *Hari Charan v. Hari Das*, (1905) 2 C. L. J. 506.

the application has been given to all persons affected thereby. (3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."¹ No order under this rule can be made without notice to all persons affected by it and an order passed without such notice is invalid.²

An auction-purchaser cannot maintain a suit for refund of the purchase-money on the ground of absence of saleable interest in the judgment-debtor.³ When a sale is set aside, the purchase-money can be had back by an application under rule 93,⁴ but if there is a fresh contract between the auction-purchaser, the judgment-debtor and the decree-holder, the auction-purchaser can sue on the basis of that contract.⁵

A suit to set aside a sale may be barred by section 47, C. P. Code.⁶

Where questions are raised between the parties to a decree relating to its execution, discharge, or satisfaction the fact that the purchaser at a judicial sale, who is no party to the decree of which the execution is in question, is interested and concerned in the result has never been held to prevent the application of section 244 of the Civil Procedure Code, limiting the disposal of these matters to the Court

1. This corresponds to old Sections 312, 314 of the C.P. Code, 1882. For commentary on this rule, see pages 481—491.

2. *Kumar Ramanand v. Bijit Singh*, (1923) Pat. 507=75 I.C. 863; *Charu Chandra v. Rai Behari Lal*, (1925) 80 I.C. 931.

3. *Banka Behari v. Querer Das*, (1924) Cal. 172; *U. Paw v. N. R. M. A. Chetty*, (1912) 13 Bur. L. T. 152=16 I. C. 805; *Hatim Miza v. Bhagwana*, (1924) 73 I.C. 517.

4. *Gur Prasad v. Lalman*, (1925) Oudh 404; *Habibuddin v. Hatim Mirza*, (1925) 26 Punj. L.R. 133=86 I.C. 622.

5. *Gur Prasad v. Lalman*, (1925) Oudh 404.

6. See *Rajagopala v. Ramanuja*, (1923) 47 Mad. 288 (303).

executing the decree. The plaintiffs in a suit to have the judicial sale of a zamindari set aside alleged that the decree-holder, in part satisfaction of his decree, had received, from them and other co-sharers in the zamindari, their proportionate amounts of the debt decreed, and had agreed that their share should be exempt from the execution sale about to take place. The sale took place, subject to that exemption; the decree-holder, however, with whom some of the co-sharers and the purchasers colluded, fraudulently had the sale set aside, revived the attachment, and caused a second sale, at which all the shares in the zamindari were sold. It was held that the question, besides that the charge of fraud was not sufficiently specific, was determinable, in virtue of the section 244 of the Code of Civil Procedure, only by order of the Court executing the decree.¹

Where circumstances affecting the validity of an execution sale have been brought about by the fraud of one of the parties to the suit and give rise to a question between the parties, such as, apart from fraud, would be within section 47 Civil Procedure Code, a suit will not lie to impeach the validity of the sale on the ground of such fraud.²

When the Court had no jurisdiction to execute the decree and to order sale in execution, the sale is merely irregular and not void. Such a sale rests

1. *Prosunno Kumar v. Kalidas*, (1892) 19 Cal. 683. See also *Paranjpe v. Ranade*, (1882) 6 Bom. 148; *Sakharan v. Damodar*, (1885) 9 Bom. 468; *Kuriyali v. Mayan*, (1883) 7 Mad. 255.

2. *Mahendro v. Gopal*, (1890) 17 Cal. 769 F.B.; *Debendra-nath v. Prasanna Kumar*, (1907) 5 C.L.J. 328; *Viraraghava v. Venkata*, (1882) 5 Mad. 217; *Krishnan v. Arunachellam*, (1892) 16 Mad. 447.

valid unless set aside by proceedings in execution or by a regular suit.¹ The Civil Procedure Code prescribes an application to set aside a sale on specific grounds and in these cases an application is the only remedy.² The question whether a sale held in execution is valid or not is one relating to the execution of the decree and must be determined by S. 47.² Bar of suits.

An application to set aside a sale on the ground of non-service of notice under Order 21, rule 22 falls under section 47 and not under Order 21, rule 90. In saying whether the non-issue constitutes a material irregularity in publishing and conducting the sale their lordships said "It is rather an irregularity in proceedings which are anterior to the publishing or the conduct of the sale. We think the words 'publishing or conducting of the sale' refer respectively to the proclamation of the sale under section 287 and to the action of the officer by whom the sale was held. In our opinion then this application does not fall under section 311, and the order consequently does not fall under section 312. That being so, the order in our opinion falls under clause (c) of section 244. It has been suggested that clause (c) of section 244 is inapplicable inasmuch as the decree was already executed, but the question involved was none the less a 'question relating to the satisfaction of the decree' within the meaning of the clause."³

1. *Lala Siva Ram v. Kashi Ram*, (1890) P.R. 76 ; *Ramsona Chowdhurani v. Sonamala Chowdhurani*, (1911) 16 C.W.N. 805.

2. *Venkatachellapathy v. Perumal*, (1912) 10 M.L.T. 527=13 I.C. 133.

3. *Parashram v. Balmukund*, 32 Bom. 572 (574) ; *Livinia Ashton v. Madhabmoni Dasi*, (1910) 11 C. L. J. 489 ; *Kumed Bewa v. Prasanna Kumar Roy*, (1912) 40 Cal. 45 (49) ; *Lakshmi-charan v. Sris Chandra Roy*, (1910) 13 C. L. J. 162=9 I.C. 584.

Bar of suits.

A separate suit to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court, but not certified in the manner required by law is barred by section 47.¹ When an application was made to set aside a sale on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale out of court, but the payment was not certified, it was held that the fraud was not in conducting or publishing the sale, and that the application therefore came under section 47.²

Where after a sale is held in execution of an *ex parte* decree, the *ex parte* decree was itself set aside the sale can be set aside by an application under section 47 and when the decree-holder is himself the purchaser the application will lie even after confirmation.³

When an occupancy right not transferable by custom was sold in execution, an application to quash the sale can be entertained under section 47 on the ground that the sale was illegal and void,⁴ and a separate suit does not lie. Oldfield J. said, "In the case before us, the judgment-debtor has sued the auction-purchaser to recover the property sold in execution of the decree, on the ground that the property, which is a tenant's right in land, is not

A second appeal will therefore lie; see also *Hari Lal Ghose v. Chandra Kanta Ghose*, (1899) 26 Cal. 539.

1. See Vol. I. 270.

2. *Alokeshi v. Biriaj*, (1911) 10 I.C. 625. So far as the execution Court was concerned, the payment could not be regarded as having been made and the allegation of payment consequently fell to the ground and the sale could not be set aside.

3. Set *Umedmal v. Srinath*, (1900) 27 Cal. 810; *Sri Maharani Beni Prasad v. Lokhi Rai*, (1893) 3 C.W. N. 6.

4. *Durga Charan v. Kali Prasanna*. (1899) 26 Cal. 727.

by law saleable in execution of decree. This question is one which arose between the plaintiff judgment-debtor and the decree-holder, who is also the purchaser, and was determined against the former by the Court which executed the decree prior to the sale, and it is a question which must be considered to relate to the execution, discharge, or satisfaction of the decree. It is in effect whether any property was liable to attachment and sale to satisfy the decree. Certain things are by section 266 of the Code of Civil Procedure not liable to attachment and sale. The questions regarding liability to attachment and sale arising out of the provisions of section 266 of the Code of Civil Procedure would clearly be questions within the meaning of section 244 of the Code of Civil Procedure. The question of the liability of the property, the subject of this suit, to attachment and sale, arises out of a provision in the Rent Act; but equally with questions under section 266 of the Code of Civil Procedure, it is one which falls within the meaning of section 244 of the Code of Civil Procedure."¹

Bar of suits.

Where property the transfer of which is prohibited by law as opposed to public policy, such as a temple office, is sold, the sale can be set aside, though made in pursuance of a compromise decree, by an application in execution proceedings under section 47.²

No suit will lie to set aside the sale on the ground that the sale proceedings were secretly brought about and that the purchasers were

1. *Basti Ram v. Fattu* (1886) 8 All 140. See also *Sakhirai v. Ramautar Rai*, (1920) Pat. 221 = 57 I. C. 261.

2. *Lakshmanasami v. Rangamma*, (1902) 26 Mad. 31.

Bar of suits. benamidars of the decree-holder who had no leave to bid at the sale and the remedy is by an application under section 47.¹

A separate suit will not lie to set aside a sale, on the ground that the person declared as purchaser at a court-sale failed to deposit 25% of the purchase-money as required under section 300, C. P. Code.²

Applications to set aside sales on the following grounds fall under section 47,³ and not under this rule: on the ground that the decree was without jurisdiction,⁴ or that the party whose property was sold was not the judgment-debtor,⁵ or if the property of the representative that the latter had not inherited from the judgment debtor,⁶ or that the decree in execution of which the property was sold was barred by limitation,⁷ or that the decree under execution was obtained without service of summons on the judgment-debtor,⁸ or that it was obtained by fraud,⁹ or that the property sold was not saleable within the meaning of section 60,¹⁰ or that the sale was held in contravention of the terms of the decree.¹¹

1. *Durga Kumar v. Balwant*, (1901) 23 All. 478.

2. *Bhim Singh v. Sarwan* (1888) 16 Cal. 33.

3. *Tassaduk Rasul v. Ahmad Husain*, (1893) 21 Cal. 66 P. C., *Harbans Lal v. Kundan Lal*, (1898) 21 All. 140 ; *Joy Narain v. Goluck Chunder*, (1875) 25 W.R. 183.

4. *Goodur Lall v. Hubeboonissa*, (1871) 15 W.R. 31 ; *Shirin v. Agha Ali*, (1896) 18 All. 141.

5. *Ramchhaibar v. Bechu*, (1885) 7 All. 641.

6. *Wahed Ali v. Jumaye*, (1861) 6 W.R. Mis. 116.

7. *Gangathara v. Rathabai*, (1883) 6 Mad. 237. *Lakhu Rai v. Kesho Prasad*, (1917) 2 Pat. L.J. 157=38 I.C. 876 (the application can be entertained after confirmation.)

8. *Net Lal v. Sheik* (1896) 23 Cal. 686.

9. *Khagendra v. Prannath*, (1902) 29 Cal. 395 P.C.

10. *Ramachaibar v. Bechu*, (1885) 7 All. 641 ; *Umed v. Jai Ram* (1917) 29 All. 612. See *Sukhi Ram v. Ramautar Rai*, (1920) Pat. 221=57 I. C. 261.

11. *Palniappa v. Arumuga*, (1916) 1 M.W.N. 256=33 I.C. 692.

Under Article 166 of the Indian Limitation Act 1908, an application under the C. P. Code, 1908, to set aside a sale in execution of a decree must be filed within thirty days from the date of the sale and under Article 181, an application, "for which no period of limitation is provided elsewhere in this schedule, must be filed within three years from the date when the right to apply accrues."¹ Limit ation.

According to the Calcutta High Court, Article 166 is quite general in its expression and is not limited to application under Order 21 rules 89 and 91, C. P. Code so that an application under section 47 C. P. Code to set aside a sale in execution, whether it is void or voidable, is governed by Article 166 only.

Therefore, an application under section 47 by the son of a deceased judgment-debtor to set aside a sale of property on the ground that the property belonged to him only and not to his father and was not saleable under the decree fell under Art. 166.² Accordingly it was said in *Haripada Haldhar v. Barada Prasad*,³ that an application to set aside a sale under section 173 of the Bengal Tenancy Act was cognisable under section 47, C. P. Code and fell within Art. 166 and not article 181 and that the rulings in support of the contrary view—*Chand Mani v. Santa Moni*,⁴ and *Chandrama Rai v. Maharajah of Duni-roan*,⁵ "were decided under the Act as it formerly stood before the passing of the present Limitation Act when Art. 166 was restricted to a particular

1. See also Vol. I. 479.

2. *Satish Chandra v. Nishi Chandra*, (1919) 46 Cal. 975.

3. (1924) 51 Cal. 1014.

4. (1897) 1 C.W.N. 534.

5. (1916) 38 I.C. 209.

Limitation.

class of applications. That article as now worded is very much wider and is quite general in its terms governing all applications to have an execution sale set aside."

But in *Jogeswar v. Jhapal Santal*,¹ it was held that a sale in contravention of the provisions of Bengal Act II of 1918 was a nullity and in an application to set aside such sale, the question of limitation did not arise. But the learned judges did not say under what section of the C. P. Code they entertained the application and in *Ram Kinkar v. Stithi Ram*², Mookerji J, held that an application to set aside a sale held without notice under section 248 of the C. P. Code of 1882, that is, without jurisdiction fell under Art. 181 of the Limitation Act of 1908. It seems therefore that the statement of the law made in these cases, viz., that all sales, void or voidable, fall under Art. 166, that void sales are not restrained by any limitation and that void sales come under Art. 181, do not appear to be reconcilable.

According to the Patna High Court an application to set aside a void sale under section 47 C. P. Code falls under Art. 181, and an application to set aside, a sale not voidable falls under Art. 166.³

In Madras in *Rajagopal v. Ramanuja*,⁴ the Full Bench held that though where a sale in

1. (1923) 51 Cal. 224.

2. (1918) 27 C. L. J. 528 = 46 I. C. 221.

3. *Babu Das v. Muhammad* (1921) Pat. 181 = 61 I. C. 823.

4. (1923) 47 Mad. 288 F. B. approving *Seshagiri Rao v. Srinivasa Rao* (1920) 43 Mad 313 ; *Sambandam v. Akath Nagai*, 26 M L J. 267 = 23 I. C. 251 ; *Neetu v. Subrahmanya*, (1919) M.W.N. 397 = 53 I. C. 809 and overruling *Paramasiva v. Pulukaruppa*, (1924) Mad. 137 = 45 M L J. 829 ; *Muthiah v. Bava Sahib*, (1914) 27 M.L.J. 605 ; *Kannayya v. Ramanna*, (1922) Mad. 95 = 16 L.W. 934 ; *Ganapati v. Krishnamachari*, (1922) Mad. 417 = 43 M.L.J. 184. See also *Payidanna v. Lakshminarasanna*, (1915) 38 Mad. 1076.

execution is a nullity it has not got to be set aside, Limitation yet if one party files an application to have it set aside either under section 47 C. P. Code or otherwise, it is governed by Art. 181 of the Indian Limitation Act, 1908 and not by Art. 166.

The following applications were held to fall under Article 181, an application of the insolvent or of his creditor for cancelling on the ground of fraud a sale of immoveable property by the Insolvency Court in realising the assets of the insolvent,¹ an application of an exonerated defendant to set aside sale of his property,² an application to set aside a sale held under an ex parte decree subsequently set aside,³ an application to set aside a sale on the ground of fraudulent suppression of sale process,⁴ on the ground that the purchaser was a benamidar for the judgment-debtor.⁵

The following applications were held to fall under Article 166: an application to set aside a sale on the ground that the decree-holder purchased property without leave to bid,⁶ an application to set aside a sale in execution of a decree passed against the father on the ground that the property sold belonged to the applicant and not to the father,⁷ an appli-

1. *Afzal Ali v. Amar Ali*, (1914) P.W.R. 36 = 23 I.C. 397.

2. *Seshagiri Rao v. Sreenivasa Rao*, (1920) 43 Mad. 213.

3. *Shivabai v. Yesu*, (1919) 43 Bom. 235 (from the date when the decree was set aside).

4. *Ram Kinkar v. Sithiti Ram Panja*, (1918) 27 C.L.J. 528 = 46 I.C. 221. See also *Neelu v. Subramania*, (1920) 11 L.W. 59 = 53 I.C. 809.

5. *Narayan v. Muhammad*, (1914) 24 I.C. 366; *Chandrama v. Maharaja of Duniiram*, (1916) 38 I.C. 209; on this last case see *Haripada v. Baroda Prasad*, (1924) 51 Cal. 1014.

6. *Ganesh Narain v. Gopal Vishnu*, (1917) 41 Bom. 357. See also *Sakharan v. Damodar*, (1885) 9 Bom. 468; *Marimuthu v. Subbaraya*, (1903) 13 M.L.J. 231.

7. *Satish Chandra v. Nishi Chandra*, (1919) 46 Cal. 975.

cation to set aside a sale on the ground of fraud,¹ on the ground of want of or defective attachment.²

An application to set aside sale of plots not specified in mortgage deed and the decree for sale and for recovery of possession was held to fall under Art. 165 and not Art. 166.³

Extension of
time.

The Court cannot extend the period of limitation⁴ except on the ground of fraud⁵ etc. as provided by the Indian Limitation Act.

A judgment-debtor who seeks to set aside a sale under Order 21 rule 90 and who relies on section 18 of the Limitation Act must prove that there was some contrivance on the part of the decree-holder by which the judgment-debtor was kept from the knowledge of the right to apply. The fraud to be proved is not the fraud and the conduct of the sale, but the fraudulent concealment of the proceedings must be proved and the general conduct of the decree-holder before and after the sale must be considered.⁶ If initial fraud is proved, there is no need to prove any fraud after the sale for the initial fraud must be deemed to have continued and it is only after he become aware of the sale, that the judgment-debtor can be said to have

1. *Bashi Ram v. Hassan Mahomed*, (1919) 51 I.C. 447; *Alliar Rowther v. Narayana Kudumban*, (1924) Mad. 817=81 I. C. 844. See also *Baldeo v. Meghu Singh*, (1919) Pat. 386=74 I. C. 202 (three years from sale or knowledge of fraud.)

2. *Maowa v. Mahomed Tambi*, (1921) 1 Ran. 533.

3. *Raja Ram v. Itraj Kunwar*, (1914) 17 O.C. 94=24 I.C. 137.

4. *Genda Mal v. Munshi Ram*, (1920) 57 I C. 224.

5. *Bashi Ram v. Hassan Mahomed*, (1919) 51 I.C. 447; *Ramdhari v. Deonandan*, (1922) 2 Pat. 65; *Mahaberi Ram v. Ram Bahadur*, (1923) Pat. 435=72 I. C. 635. See Vol. I, Chap. X and *Ibid.* p. 468.

6. *Bajrang Prasad v. Mt. Sonjhari*, (1925). Pat. 521=85 I.C. 622; *Kishundeo v. Ramrijan*, (1924) Pat. 67=83 I.C. 748.

known of his right to apply.¹ When the fraud was not by the decree-holder but by the purchaser, the exemption under the section does not apply.²

Neither Section 47 nor Order 21 rule 92 bars a suit by a person whose objection under rule 89 has been disallowed where he was neither a party to a suit in which the decree was passed nor to the execution proceedings which followed the decree.³

The finality and validity of an order depends on its compliance with the terms of the law. When therefore an auction sale of landed property was set aside solely on the objection of the judgment-debtor that the price realised was low, and no irregularity was alleged, it was held that the Court has failed to do the duty imposed on it by law of confirming the sale, and exceeded its jurisdiction by cancelling the sale, and a suit would lie by the auction-purchaser to cancel the order of the Court cancelling the sale.⁴

Although a bonafide purchaser at a court-sale is protected when the decree was passed by a Court of competent jurisdiction, notwithstanding the fact that the decree was vitiated by illegality or was afterwards set aside, he receives no such protection when the irregularity is in the conduct of the sale itself. Where therefore the sale is held without notice to a major judgment-debtor wrongly taking him as a minor, it was held that it was such a grave

1. (1925) 47 All. 850.

2. *Azizanessa v. Dwarika Prasad*, (1925) Cal. 1227=86 I.C. 745.

3. *Bhan Singh v. Pirthmi Chand*, (1916) P.L.R. 104=36 I.C. 212.

4. *Sukhai v. Daryai*, (1876) 1 All. 374; *Diwan Singh v. Bharat Singh*, (1881) 3 All. 206 F. B.; *Kristo Moni Gupta v. The Secretary of State for India in Council*, (1899) 3 C.W.N. 99.

irregularity as vitiated the sale and that the judgment-debtor was entitled to maintain a suit on the sole ground of want of notice, unless the defendant pleaded facts which raised valid defences to the claim of the plaintiff which was *prima facie* sustainable.¹

Suit to set
aside sale.

A suit lies to set aside an execution sale on the ground that the decree in pursuance of which the sale was held was obtained by fraud and was not as such binding on the party affected.² Where a decree was passed against A and others and the decree-holder received some money in full discharge of A's liability, but the payment was not certified to Court, the sale held afterwards of A's property, wherein the decree-holder became himself the purchaser, can be set aside by a regular suit.³ Where after an agreement to postpone an execution sale was come to and filed in Court but in the wrong Court, and in a sale consequently held by mistake in the judge's absence, the decree-holder bid for and purchased the property, a suit was maintained to set the sale aside.⁴ Where the objection of the judgment-debtor on the ground of bar by limitation was overruled and in a sale held under the decree the decree-holder purchased the property, a suit lay to set aside the sale after the court of appeal held that the execution was barred by limitation.⁵

In an application to set aside sale purporting to have been signed by a person, a compromise was

1. *Tanguturi Jagannadham v. Seshagiri*, (1916) 20 M.L.T. 479.

2. *Motilal v. Russick*, (1896) 26 Cal. 326 note.

3. *Uman Chunder v. Indro Narain*, (1883) 9 Cal. 788.

4. *Gunga Pershad v. Gopal*, (1884) 11 Cal. 136.

5. *Mina Kumari v. Jagatsaltani*, (1883) 10 Cal. 220.

filed signed by the person who presented an application to set aside the same sale. It was held that she was entitled to show in this application that the compromise was obtained without her participation and in fraud of her rights without setting it aside by review or by a regular suit.¹

If a purchaser at a court-sale was induced by fraud to pay a larger sum for the property purchased than he would have had to pay if he had not been so deceived and complained that he had been led into a mistake as to the extent of the property sold, he had no remedy by application to set the sale aside and a suit was therefore maintainable.²

When the mortgagor of certain property, which has been brought to sale in execution of a decree obtained thereon, sues to set aside the sale on the ground of fraud practised by the purchaser, the pleader of the mortgagee in purchasing the property himself in an underhand manner, the circumstance that fraud was not alleged against the purchaser in a petition brought for the same purpose under S. 311 C. P. Code would not vitiate the suit.³

When the appellant had successfully resisted a suit to set aside a sale on the ground that a suit was not a proper remedy, but that the matter should be tried in execution, he should not be allowed to go behind that and object in the execution proceedings that an application under S. 47 did not lie, but that a suit must be brought.⁴ But when the objection

1. *Sreematy Asaban v. Ananda Chandra*, (1909) 3 I.C. 116.

2. *Birj Mohun v. Rai Umanath*, (1892) 20 Cal. 8 P.C.

3. *Subbarayudu v. Kotayya*, (1892) 15 Mad. 389.

4. *Gaya Prasad v. Randhir*, (1906) 28 All. 681.

to the suit did not come from the defendant, but the Court erroneously decided that the suit did not lie and the remedy was in execution proceedings, the error was to be set right only by appeal and the defendant would not be precluded from pleading, in answer to execution proceedings, that the remedy was by a suit only.

Where an application to set aside sale on the ground of fraud is rejected the judgment-debtor cannot litigate the same point again. An auction sale is good until set aside. If the defendant has a good cause of action, he may seek a remedy, but he cannot oppose the plaintiff's suit on that ground.¹

Limitation
for suit.

A suit to set aside a sale held in execution of a decree of a Civil Court or in pursuance of a decree or order of a Collector or other officer of revenue must be instituted under Article 12 of the Indian Limitation Act, 1908 within a year from the date when the sale is confirmed or would otherwise have become final and conclusive, had no such suit been brought.

If sale is
void.

A sale in execution which is null and void on any grounds described in the previous chapter has in the eye of law no existence whatever and being incapable of affecting any existing rights, need not be set aside. It can be declared to be void in a suit framed for the purpose and to such suit, with or without consequential reliefs, this Article has no application,² and the ordinary period of limitation fixed in the Limitation Act will apply. Where the decree under which the sale was held

1. *In re Jhara Biswas*, (1916) 38 I.C. 47.

2. *Sitaran v. Subheda Kuar*, (1914) 24 I.C. 695; *Ahmid Yar Khan v. Dinanath*, (1925) Cal. 1140=90 I.C. 40.

was passed by a Court which has no jurisdiction¹ or where the Court which ordered the sale had no jurisdiction,² or the officer who held the sale has no authority to sell,³ the sale is void and a suit to declare it so is not within this Article.⁴ So it will be where the property of a stranger has been sold in execution of a decree to which he was no party,⁵ where property was sold ostensibly in execution of a decree, but the sale of which was not in fact authorised by the decree,⁶ where the decree was

1. See Chapter XXI *supra*: *Sadagopa v. Jamma Bai*, (1882) 5 Mad. 54; *Seshagirirao v. Tangaturi*, (1915) 32 I.C. 391.

2. *Raman v. Chandan*, (1891) 15 Mad. 219 (under Act II of 1864); *Balwant Rao v. Muhammad Husain*, (1893) 15 All. 324 (sale for court-fees not due.)

3. *Derab Ally Khan v. Khazah Mohiooddeen*, (1877) 5 I.A. 116.; *Nazar Ali v. Kedarnath*, (1897) 19 All. 308.

4. *Mulchand v. Bhup Indro*, (1890) 10 A.W.N. 69; *Annada Pershad v. Prasanna Moyi*, (1907) 34 Cal. 711 P.C.; *Purnachandra v. Dinabandhu*, (1907) 34 Cal. 4 F.B.; *Saroda Charan v. Kista Mohun*, (1896), 1 C.W.N. 516; *Sookan v. Lala Badrinarain*, (1905) 5 C.L.J. 686; *Sham Lal v. Nilmani*, (1907) 34 Cal. 241; *Nazar v. Kedarnath*, (1897) 19 All. 308; *Lala Siva Ram v. Kashi Ram*, (1890) P.R. 76; *Prangour v. Himanta Kumary*, (1886) 12 Cal. 597. *Chouharja v. Kaniz*, (1910) 13 O.C. 297=8 I.C. 374. *Erava v. Sidramappa*, (1897) 21 Bom. 424 F.B.; *Jahnavi Prasad v. Gharbaran*, (1916) 35 I.C. 404; *Bakoo Jodoonath v. Radhamonee*, (1867) 7 W.R. 256 F.B.; *Hira v. Ghulam*, (1918) P.R. 113=48 I.C. 399; *Ma Ng Ma v. Ma Sheve*, (1916) 10 Bur. L.T. 225=30 I.C. 3.

5. *Mt. Sharafatunnissa v. Lachminarain*, (1875) 7 N.W.P. 288; *Venkatanarasiah v. Subbamma*, (1881) 4 Mad. 178.

6. *Sadagopa v. Jamma Bhai*, (1882) 5 Mad. 54; *Nilakanda v. Thandamma*, (1886) 9 Mad. 460; *Narasimha Naidu v. Ramasami*, (1894) 18 Mad. 478; *Khadar Hussain v. Hussain Sheeb*, (1896) 20 Mad. 118 F.B.; *Tarachand v. Abdul Ahad*, (1922) 67 I.C. 894; *Sharfuddin v. Humsraj*, (1911) P. L. R. 203=11 I. C. 76; *Nathu v. Badridas*, (1883) 5 All. 614; *Tota Ram v. Chain Sukh*, (1888) A. W. N. 154; *Jwala Sahai v. Masial Khan*, (1904) 26 All. 346; *Nathoo Ram v. Raja Bijaya Bahadur*, (1895) 9 C.P.L.R. 113; *Ahmed Ally v. Maung Shwe Thin*, (1900) 1 L.B.R. 53; *Hijee Goya v. Zaccheus*, (1903) 4 L.B.R. 40; *Azim Khaz v. Karim*, (1923) 71 I.C. 322; *Nazar Ali v. Kedarnath*, (1897) 19 All. 308; *Khet*

passed against a minor not properly represented,¹ where the sale was held without attachment and this only in provinces where want of attachment is held to make the sale a nullity.²

A suit to set aside a sale on the ground that the judgment-debtor had previous to the sale transferred his interest to the plaintiff is not within this Article.³ Where property has been once sold in execution, a subsequent sale of the same property in execution of another decree passes nothing to the second purchaser and leaves the first purchaser's title unaffected. If the second purchaser has obtained possession in pursuance of his purchase, a suit brought by the first purchaser for possession is not a suit to set aside the sale and is governed by the ordinary rule of limitation for recovery of possession.⁵

A suit by the members of a tarwad to set aside a sale in execution of a money-decree against the Karnavan of the tarwad, when the records do not show that the Karnavan was sued in a represen-

Singh v. Mt. Radha, (1889) 3 C.P.L.R. 162. See also *Protab Chunder v. Brojokall*, (1867) 7 W.R. 253 F.B.

1. *Vishnu v. Ramchandra*, (1886) 11 Bom. 130; *Daji Himat v. Dhirajram*, (1887) 12 Bom. 18; *Lala Siva Ram v. Kashiram*, (1890) P.R. 76; *Alam Din v. Allah Din*, (1922) Lah. 447; *Hira Singh v. Ghulam Qadir*, (1918) P.R. 113=48 I.C. 399; *Pydanna v. Lakshminarasimma*, (1915) 38 Mad. 1076.

2. See Chapter XXI *supra*; *Mahadeo v. Bholanath*, (1882) 5 All. 86 F.B.; *Ramchand v. Pitam Mal*, (1888) 10 All. 506; *Lala Siva Ram v. Kashi Ram*, (1890) P.R. 76; but see now contra *Sheo Dhyani v. Bholanath*, (1899) 21 All. 311.

4. *Radha Koonwar v. Jankee Boonwar*, (1862) 9 W.R. 199; *Nisar Ali v. Madho Das*, (1890) A.W.N. 224.

5. *Motilal v. Karrabuddin*, (1897) 25 Cal. 179 P.C.; *Prangour v. Himanta Kumary*, (1886) 12 Cal. 597; *Nagina v. Puran*, (1906) P.R. 11; *Chauharja v. Kaniz Fatima*, (1910) 13 O.C. 297=8 I.C. 374.

tative capacity or that the debt sued upon was a backward debt, is not governed by this Article.¹

The sale of moveable property belonging to one man under an execution against another is not a mere irregularity. The owner is entitled to sue either for the restoration of the property specifically or for damages when the owner asks either it is in the option of the Court to award either, according to its own view of the justice of the case.²

Under section 10 of the Public Demands Recovery Act (Bengal Act I of 1895), the service of notice is a condition precedent to the validity of a sale of immovable property in execution of the certificate and a sale held without such notice is a nullity. If the sum has been deposited in the treasury, and the officer overlooked it and issued notice and sold the property, the sale is without jurisdiction.³

1. *Haji v. Atharaman*, (1884) 7 Mad. 512. See also *Ittiachan v. Velappan*, (1885) 8 Mad. 484 F.B.; *Thenju v. Chimmu*, (1884) 7 Mad. 413; *Moidin Kutti v. Krishnan*, (1887) 10 Mad. 322; *Kanappan v. Ukkaran*, (1893) 17 Mad. 214; *Vasudevan v. Sankaran*, (1897) 20 Mad. 129; *Manakat Velamma v. Ibrahim Lelbe*, (1903) 27 Mad. 375.

2. *Mohammed v. Akial*, (1862) 9 W.R. 118; *Kanai Prasad Bose v. Hirachand*, (1870) 14 W.R. 120.

3. *Purna Chandra v. Dinabandhu*, (1907) 34 Cal. 811; *Bepin Behari v. Shashi Bhushan*, (1914) 18 C.L.J. 628 = 22 I.C. 95; *Nilkanta Narain v. Brajakumar*, (1925) 3 Pat. L.R. 37. The suit must be valued on the value of the whole property sold, *Pran Krishna v. Nitya Gopal*, (1924) 50 Cal. 892. In such case Art. 12 of the Ind. Limitation Act is not applicable. Such a suit is not maintainable after grant of the sale certificate, *Sheorutton v. Net Loll*, (1902) 30 Cal. 1; *Bhawani Koer v. Afzal Husain*, (1907) 34 Cal. 381; such a suit is not barred by S. 47 or O. 21 r. 90, C.P. Code, *Ram Taruck v. Dilwar Ali*, (1901) 29 Cal. 73 F.B., *Girish Chandra v. Golam Karim*, (1906) 33 Cal. 451. See the amendment of the Act, by Act I of 1897 which changed the law; *Hari Charan v. Chandra Kumar*, (1907) 34 Cal. 787.

If sale is
voidable.

Where a decree is not void but only voidable and binding on the parties until set aside, a suit to set aside a sale held under such decree is governed by this Article.¹ So it is when the sale is not voidable.² In such a case a suit brought beyond a year from the date of confirmation will be barred, though there is a prayer for possession, or for redemption.³ If a decree had been passed against a joint family which was effectively represented in the suit, a suit to set aside a sale held in pursuance of it falls within this Article.⁴ When a decree-holder purchases at an execution without leave to bid and in spite of the Court's refusal to grant leave, the sale is only voidable and a suit to set it aside the sale is governed by this Article.⁵ Where property outside the suit had been included by mistake in the decree as being liable to be sold in satisfaction of the decree and was sold in execution and two years after the sale the judgment debtor sued to recover it, it was held that the sale was not a nullity and was to be set aside within 30 days of its date and that the suit was barred by this Article.⁶ Where in execution of a mortgage decree, a prior mortgagee purchased the property, a suit to set aside the sale (if invalid) is within this Article.⁷

1. *Abdul Munsoor v. Abdul Hamid*, (1876) 2 Cal. 98; *Ragavendra v. Karuppa*, (1896) 20 Mad. 33; *Rajkumar Sorkel v. Rajkumari Mali*, (1916) 20 C.W.N. 569=33 I.C. 767 (though the decree was fraudulently obtained).

2. *Imam Din v. Purnachand*, (1920) 1 Lah. 27.

3. *Choudhry v. Kalce Mohan*, (1874) 22 W.R. 84; but not when the sale must not be set aside: *Mt. Anchorage v. Mt. Bhugbutty*, (1875) 25 W.R. 148.

4. *Ranjit v. Ramjatan*, (1917) Pat. 113=37 I.C. 833; *Bhola Jha v. Keli Prasad*, (1916) 1 Pat. L.J. 180=34 I.C. 288.

5. *Rai Radha Krishna v. Bisheshwar Sahay*, (1922) P.C. 336.

6. *Nagabhatta v. Nalappa*, (1923) Bom. 162=24 Bom. L.R. 423.

7. *Ruttan Nair v. Krishna*, (1902) 12 M.L.J. 390.

When property sold in execution of a decree was purchased under a private sale from the judgment-debtor pending confirmation of sale and on the judgment-debtor paying the amount into Court the sale was set aside but was confirmed on appeal, a suit by the private purchaser against the auction-purchaser for possession of the property was subject to this Article.¹

Where a mortgagee purchases property in contravention of the provisions of Order 34 rule 14,² where the judgment-debtor died after attachment and sale was held without proper legal representative on record,³ where a sale was held in ignorance of the adjustment of the decree out of Court between the parties,⁴ where the decree in execution of which the sale was ordered had been barred by limitation,⁵ where property was sold in execution of a decree, notwithstanding the existence of a cross-decree for a higher amount in favour of the judgment-debtor against the same decree-holder,⁶ where the property sold was partly within and partly beyond the jurisdiction of the court executing the decree,⁷ where the

1. *Nagina Singh v. Puran Chand*, (1906) P.R. 11.

2. See Chapter XXI *supra*. *Sahadu Manaji v. Devlya Jaha Mahar*, (1916) 14 Bom. L.R. 254=14 I.C. 780; *Arjuna Reddi v. Venkatachala Reddi*, (1912) 32 M. L. J. 525=32 I. C. 611. See contra under S. 99 of T. P. Act, *Datto v. Ganesh*, (1903) 5 Bom. L.R. 952.

3. *Masuman v. Gulzari Lal*, (1920) 23 O. C. 215=58 I.C. 549.

4. *Mothura Mohun v. Akhoy Kumar*, (1888) 15 Cal. 557.

5. *Mina Kumari v. Jagat Sattani*, (1883) 10 Cal. 220; *Mahomed v. Purundur*, (1885) 11 Cal. 287; *Mussammat Mansa Devi v. Rahim Baksh*, (1894) P.R. 49.

6. *Rewa Mahton v. Ram Kishen*, (1886) 14 Cal. 18 P.C.

7. *Ram Lall v. Bama Sundari*, (1885) 12 Cal. 307; *Kally Prasonno v. Dinnonath*, (1873) 11 B.L.R. 56.

auction-purchaser sued for cancellation of the sale on the ground that the property put up for sale was wrongly described,¹ when the decree under which property was sold was subsequently reversed on appeal,² where a decree is passed against the representatives of a deceased person as such representatives and as being in possession of assets and property forming part of such estate is sold in execution,³ or when in execution of a decree against a minor in a suit in which he was properly represented, his property is sold and he cannot recover possession from the purchaser without setting aside the sale,⁴ or where several years after a mortgage-decree against the father, and sale held under it, the sons sued for account, redemption and annulment of the sale,⁵ the suit is governed by Art. 12.

So is a suit in which the substantial relief is to set aside an execution-sale.⁶ When the mortgagee made only one of two persons, who represented the estate of the mortgagor, a party defendant, not having notice of the existence of the other, the property was sold in execution of the decree, a suit by the other person to redeem the mortgage after the sale of the property is governed by this

1. *Mohamed v. Norroji*, (1885) 10 Bom. 214.

2. *Parshadi v. Muhammad*, (1883) 5 All. 573.

3. *Fala Singh v. Harnama*, (1918) P L.R. 40=43 I.C. 712.

4. *Seshagiri v. Jagannadham*, (1915) 39 Mad. 1031; *Imam Din v. Puri Chand*, (1920) 1 Lah. 27=55 I.C. 833.

5. *Bhola Jha v. Kali Prasad*, (1916) 1 Pat. L. J. 180=34 I.C. 288. See also *Ramjit v. Ramjatan*, (1917) Pat. 113=37 I.C. 833.

6. *Gurunarain v. Ram Narain*, (1898) 1 O.C. 83. See also *Ram Kanth v. Kalee Mohan*, (1874) 22 W.R. 84; *Abdul Munsoor v. Abdul Hamid*, (1876) 2 Cal. 98; *Sreemutty v. Sheebanee*, (1860) 5 W.R. 123; *Ramessur v. Majeda*, (1861) 7 W.R. 252.

Article, as he cannot succeed without the sale being set aside.¹

For the purpose of this Article, time begins to run not from the date of sale, but from the date of confirmation,² or where there is no need for confirmation, from the date when the sale becomes otherwise final under the law under which the sale is held.³ The certificate of sale must bear the date of confirmation.⁴ If an order confirming a sale is set aside and is subsequently restored, the date of final confirmation must be taken to start the limitation.⁵

In computing the period of limitation, time required for obtaining copies under section 12,⁶ the period of disability under sections 6 and 7,⁷ and the period during which the plaintiff's right to sue is concealed by fraud under section 18,⁸ will be excluded. Likewise will other exemptions such as absence from British India, pendency of infructuous proceedings, stay or injunction mentioned in the Indian Limitation Act apply.

Sales which have become unimpeachable by the

1. *Ram Taran v. Rameswar*, (1907) 11 C.W.N. 1078=6 C.L.J. 719.

2. *Baijnath Sahai v. Ramgut Singh*, (1896) 23 Cal. 775 P. C. (1921) 43 Mad. 185 F.B.

3. *Bhuban Mohun v. Girish Narain*, (1911) 13 C.L.J. 339=10 I.C. 87 (under Beng. Reg. VII of 1819).

4. C. P. C., O. 21, r. 94.

5. *Baijnath Sahai v. Ramgut Singh*, (1896) 23 Cal. 775 P.C.

6. *Chunder Roy v. Brojo Behary*, (1881) 9 C.L.R. 293.

7. *Subramanya v. Sivasubramanya*, (1897) 17 Mad. 316; *Pala Singh v. Waryam Singh*, (1918) P.L.R. 40=43 I.C. 712 (the suit must be brought within a year and not within three years after attaining age); *Khoda Bux v. Budree Narain*, (1881) 7 Cal. 137.

8. *Rhodes v. Padmanabha*, (1914) 17 M.L.T. 18=26 I.C. 369; *Shekambas v. Ram Kumar Das*, (1914) 23 I.C. 240.

lapse of the period of limitation, cannot be impeached directly or collaterally.¹

Suit to set
aside decree
and sale.

Under Article 95 of the Indian Limitation Act, 1908, a suit to set aside a decree obtained by fraud or for other relief on the ground of fraud must be instituted within three years from the date when the fraud becomes known to the party wronged.

A sale in execution of a fraudulent decree is only voidable and when the right to impugn the decree is barred by Art. 95, the sale cannot be set aside.²

If a decree is tainted with fraud, a suit will lie to set aside the execution sale, though the decree may have been set aside previously under section 108 Civil Procedure Code and there is no subsisting decree to be set aside in the suit in which the sale is impeached.³

A suit by a reversioner to set aside a sale in execution of a decree against a widow on the ground of fraud and collusion between her and the decree-holder is only one for a declaration that the sale does not bind his reversionary interest and as he is not bound to set aside the sale, the suit is governed by Art. 95 or by Art. 120.

When the judgment-debtor sues to set aside a sale and recover possession from the purchaser, on

1. *Muthusami Iyer v. Sree Methanithi Swamiar*, (1913) 38 Mad. 356.

2. *Raj Kumar v. Raj Kumar*, (1916) 20 C.W.N. 659 = 33 I.C. 767.

3. *Debendranth v. Prasanna Kumar*, (1907) 5 C.L.J. 328. *Mati Lal v. Russick Chandra*, (1899) 26 Cal. 326 note.

4. *Pareksh v. Bai Vakhat*, (1886) 11 Bom. 119. See also *Tallapragada Sundrappa v. Boorugapalli Sriramulu*, (1907) 30 Mad. 402. See *Kali Mohun v. Anonda Moyce*, (1881) 9 C.L.R. 18.

the ground that the sale took place in consequence of the defendant's fraud or that the decree under which the sale took place and the entire proceedings resulting therefrom, were vitiated by fraud, in which the purchaser participated, the suit was governed by Art. 95.¹

Where a sale on a certificate issued under Bengal Public Demands, Recovery Act (I of 1895) is sought to be set aside on the ground of fraud and the fraud is established, the suit is governed not by this Article but by Article, 95.²

The primary Court has power in certain circumstances to set aside an execution sale on a ground not mentioned in the application of judgment-debtor and did not in fact exist when the application was made.³

Inherent power to set aside sale.

The Court has inherent power to set aside its order of confirmation of sale in favour of a person other than the bidder and there is no question of limitation in the matter.⁴ The Court has inherent power to cancel a sale of its own accord, when it discovers in the course of the proceedings that the decree-holder auction-purchaser deliberately misled it and profitted thereby to the disadvantage of the

1. *Chenvirappa v. Puttappa*, (1887) 11 Bom. 708 ; *Moti Lal v. Russick*, (1901) 26 Cal. 326 note ; *Ramcharan v. Rameshwar*, (1903) 16 C.P.L.R. 131, *Krishnabhupati v. Ramamurthi*, (1892) 16 Mad. 198 ; *Natha Singh v. Jodha Singh*, (1884) 6 All. 406 ; *Deben-dranath v. Prasana Kumar*, (1907) 5 C.L.J. 323, *Hitendranath v. Rameswar*, (1925) 4 Pat. 510 ; *Fazluddin v. Khetra Ghorai*, (1925) 90 I.C. 866 ; *Ambikamoni v. Khettra Ghosai*, (1926) 30 C.W.N. 59.

2. *Syamal Mandal v. Nilmay Das*, (1907) 34 Cal. 241.

3. *Abdul Rahman v. Sarafat*, (1815) 20 C.W.N. 667 = 31 I.C. 896.

4. *Ali Muhammad v. Ali Khanum*, (1915) 2 O.L.J. 216 = 30 C. 230.

judgment-debtor or the judgment-debtor's creditors.¹ When after the sale in execution of a decree the decree-holder is paid the full amount due and the parties desire that the sale should be set aside, the Court may treat the sale as of no effect and decline to confirm it.² But in a case where Order 21 rule 91 applies, and an application under that rule is barred by time, the Court cannot exercise inherent powers to set aside the sale.³

Suit to
confirm sale.

A suit by a purchaser at a sale of immoveable property in execution of a decree which has been set aside under sections 311 and 312 of Act X of 1877 (now O 21 rr. 89, 90) to have such sale confirmed on the ground that there was no irregularity in the publication or conduct thereof, is not barred. Spankie J. said "The wording of section 257 of Act VIII of 1859 and the wording of s. 312 of Act X of 1877 are not identical. In the old Act, the passage runs as follows:—"If the objection be allowed, the order made to set aside the sale shall be final: if the objection be disallowed, the order confirming the sale shall be open to appeal, and such order unless appealed from, and if appealed from, then the order passed on the appeal, shall be final, and the party against whom the same has been made shall be precluded from bringing a suit to establish his claim." The result of this was that a party desirous of bringing a suit to confirm a sale, in consequence of an order in appeal setting it aside, was strictly precluded from doing so by the words of the section. No suit could be brought by

1. *Raghavachariar v. Murugesu Mudali*, (1923) 46 Mad. 583.

2. *Ram Prasad v. Ram Charan*, (1915) 27 I.C. 601; see also *Mahomed v. Budhsen*, (1911) 16 A.L.J. 750=47 I.C. 885.

3. *Muthiah Chettiar v. Bawa Sahib*, (1914) 27 M.L.J. 605=26 I.C. 46.

the party against whom an order was passed to establish his claim whatever it might be, and in the case of an auction-purchaser it would be a claim to maintain the sale in his favour on the ground that there had been no material irregularity in publishing or conducting it. But the words of s. 312 are different :—" If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale." It is not said, as it was in s. 257 of Act VIII of 1859, that " if the objection be allowed, the order made to set aside the sale shall be final." But it is added that " No suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made." As we have seen, there is only an appeal from an order confirming the sale. If the appeal be disallowed, it is dismissed and the sale confirmed. If the appeal be decreed, the sale is set aside upon the ground that there was a material irregularity in the publishing or conducting it. From this order there is no appeal, but an order by the Court executing the decree and setting aside the sale on this ground has not been declared final by s. 312. Thus there is nothing to preclude a person from coming into Court to confirm a sale on the ground that there was no irregularity, though not to sue to set aside an order of confirmation, passed in appeal, on the ground that there was material irregularity in the publishing or conducting the sale. Any claim in a suit was barred by s. 257 of Act VIII of 1859. The suit to set aside a sale, when confirmed, on the ground of material irregularity in publishing and conducting it alone is barred by s. 312."¹

1. *Azimuddin v. Baldeo*, (1881) 3 All. 554 F.B. See also *Sukhai v. Daryai*, (1877) 1 All. 374.

Likewise a suit lies for confirmation of a sale held in execution of a decree by the Collector under s. 320 of Civil Procedure Code of 1882 and to set aside an order passed by the Collector cancelling the sale.¹

2. *Bandi Bibi v. Kalka*, (1887) 9 All. 602 ; *Mathura Das v. Panhalal*, (1894) 19 Bom. 216 ; See also *Bai Anthi v. Modhar*, (1891) 15 Bom. 694.

CHAPTER XXIV

Auction-Purchaser

Sale by auction—Payment of price—Resale—Discovery of defects—Annulment of sales—Want of saleable interest—Recovery of price—Suit and application—Change in the law—Scope of the change—Poundage—Interest—Confirmation of sale—Certificate of sale—Effect of certificate—What passes by sale—General rule and exceptions—Caveat emptor—History of the rule—Present Law—"Right title and interest"—Hindu widow—Hindu joint family—Right to partition—Impartible estates—Muhamadan debtor—Right of residence—Insolvency—Tacking of possession—Date of vesting—Right to trees etc.—Liability for rent etc.—Mortgage decree—Rights of rival mortgagees—Rival purchasers—Right of redemption—Contribution—Amount payable on redemption—Sale subject to mortgage or not—Notice of foreclosure—Subrogation—Right on annulment of sale—Improvements—Lis pendens—Representation—Benami purchases—Rule in court-sales—Extent of the rule—Limitations on the rule.

Except when the Court authorises a sale in a different mode, sales in execution are by public auction and the highest bidder is declared the purchaser.

Sale by
auction.

"(1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold. (2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.¹ "The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Payment of
price.

1. C. P. C., O. 21, r. 84.

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72."¹

Resale.

"In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold."² "Any deficiency of price which may happen on a resale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money."³

"(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property. (2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly. (3) Where a decree-holder purchases, by himself or through another person, without such permis-

1. C. P. C., O. 21, r. 85.

2. „ r. 86.

3. „ r. 71.

sion, the Court may, if it thinks fit, on the application of the judgment-debtor, or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder."¹

If the purchaser at a void court-sale discovers the true character and effect of the sale, prior to actual payment of the purchase price, he will seek to avoid making such a payment. "Every purchaser has a right to suppose that by his purchase, he will obtain the title of the defendant in execution, in case of execution sale and of the ward or in the case of a guardian's or administrator's sale. The promise to convey this title is the consideration upon which his bid is made. If the judgment or order of sale is void or if, from any cause, the conveyance, when made cannot invest him with the title held by the parties to the suit or proceeding, then his bid, or other promise to pay, is without consideration and cannot be enforced. He may successfully resist any action for the purchase-money, whether based upon the bid or upon some bond or note given by him."² "The rules of the Court on the original side of the High Court of Calcutta direct compensation for errors and mis-statements if capable of compensation in cases of sales by the Registrar. No condition of this kind governs the sale by the Sheriff."³ Where there is

Discovery of defects.

1. C. P. C., O. 21, s. 72,

2. Freeman on VOID JUDICIAL SALES, 160-161; Freeman on EXECUTIONS, S. 313.

3. *Ram Narain v. Dwarka Nath*, (1899) 27 Cal. 264. See also *Rujnarain v. Tek Lal*, (1896) 1 C.W.N. 104; *Do al Krishna v. Amrita Lal*, (1901) 29 Cal. 370.

a substantial deficiency in area of a property sold at a Registrar's sale, so that the purchaser would not have offered the price he did, if he had been aware of the deficiency, the Court will discharge the sale and not compel the purchaser to take the property with compensation.¹ Where goods offered for sale in execution of a decree are described as of a particular denomination and every circumstance points to the buyer having contracted for the specific goods produced as described and the goods tendered do not answer that description, the purchaser is entitled to reject them and if he has paid for them, to recover the price as money had and received for his use.²

Annulment
of sales.

A sale once complete may be set aside by deposit of the decree-amount, etc., under Order 21 rule 89,³ or on the ground of fraud or material irregularity in publishing and conducting sale under Order 21 rule 90 or on the ground of want of saleable interest under Order 21 rule 91 or on other grounds under section 47.⁴

Under section 315 of the C. P. Code, 1882,

Want of
saleable
interest.

“When a sale of immoveable property is set aside under section 310A & 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be new, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest the Court may direct) from any person to whom the purchase-

1. *Bank of Bengal v. Akhoy Kumar*, (1901) 6 C.W.N. 365 ; *Administrator-General of Bengal v. Aghorenath*, (1902) 29 Cal. 420.

2. *Tukaram v. Deoji*, (1920) 54 I.C. 315.

3. See Chapter XXII *supra*.

4. See Chapter XXIII *supra*.

money has been paid. The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided for by this Code for the execution of a decree for moneys."

Under this section, it was held that a purchaser at a sale in execution of a decree was competent to maintain a suit against the decree-holder for the recovery of his purchase-money when the judgment-debtor was found to have had no saleable interest in the property sold and that the purchaser was not limited to the special procedure in the execution department mentioned in this section;¹ and such a suit was governed by Article 120 of the Indian Limitation Act, 1877.²

Under Order 21 rule 93, C. P. Code, 1908,

"Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for re-payment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid."

Under this rule the purchaser's right to a refund only arises when the sale has been set aside

1. *Munna Singh v. Gajadhar Singh*, (1883) 5 All. 577; *Kishuntal v. Muhammad Safdar Ali*, (1891) 13 All. 383; *Siddheswari v. Goshain*, (1913) 35 All. 419; *Muhammad Najibullah v. Jainarain*, (1914) 36 All. 529; *Girdhar Das v. Siddheswari*, (1918) 40 All. 411; *Gurshidawa v. Gangaya*, (1897) 22 Bom. 783; *Hari-doyal v. Sheikh Samsuddin*, (1900) 5 C.W.N. 240; *Rustomji v. Vinayak*, (1911) 35 Bom. 29 [as explained in *Lakhmichand v. Chaturbhuj*, (1922) 65 I.C. 230]; *Nityanand v. Juggat Chandra*, (1902) 7 C.W.N. 105; *Ram Kumar v. Ramgour*, (1909) 37 Cal. 67; *Pachayappan v. Narayana*, (1887) 11 Mad. 269, *Nilakanta v. Imam Sahib*, (1892) 16 Mad. 361; *Mohideen v. Mahomed Mura*, (1912) 23 M.L.J. 487=17 I.C. 437; *Tirumalaisami v. Subramanian*, (1916) 40 Mad. 1009.

2. *Nilakanta v. Imam Sahib*, (1892) 16 Mad. 361; *Siddheswari v. Goshain*, (1913) 35 All. 419.

under the preceding rule (92) and the right conferred is "to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it is paid." This implies that an order will be made as incidental to the proceedings by which the sale is set aside.

Scope of the
change.

It will be observed that the second and fourth paragraphs of section 315 are not reproduced in rule 93, while the words "shall be entitled to receive back" which occurred in the third paragraph of section 315 are replaced by the words "shall be entitled to an order for repayment" in rule 93. These changes have effected a substantial alteration in the pre-existing law. *First*, the right to recover the purchase-moneys by a suit instituted within six years after the accrual of the right to sue has been taken away: *secondly*, the purchaser is restricted to his remedy by an application under rule 91, which must be made within thirty days from the date of the sale under Article 166 of the Limitation Act, 1908, followed by an application under rule 93 which may be made within three years from the accrual of the right under Article 181.¹

Therefore an auction-purchaser in execution of a decree who is deprived of his property by reason of the fact that the judgment-debtor had no saleable interest therein or who is evicted under a title paramount to that of the judgment-debtor is not entitled under the present Code to bring a suit for recovery of the purchase-money from the decree-holder.²

1. *Makar Ali v. Sarfuddin*, (1922) 50 Cal. 115, where there is a complete collection of the case-law.

2. *Nagendranath v. Sambhunath*, (1925) 3 Pat. 947=88 I.C. 212; *Nannu Lal v. Bhagwan Das*, (1916) 39 All. 114; *Ram Saroop v. Dalpat Rai* (1921) 43 All. 60; *Jurannu v. Jathi*, (1918) 46 I.C. 783.

In the case of sale which took place when the C.P.C. Code, 1882, was in force a right of suit had accrued, while that Code was in force and that right cannot be affected by the provisions of the new Code¹ and such a suit falls under Art. 120 of the Indian Limitation Act.² In *Inti Tarini v. Komolo Bisoyi*, held under the C.P. Code, 1882 when a sale in execution was set aside on the ground that the judgment-debtor had no saleable interest in a separate suit after the C.P. Code, 1908 came into force, it was held that the purchaser must enforce his claim to recover the purchase-money not by execution under section 325 of the old code but by a separate suit only.³

Regarding this right of suit, a distinction was expressed in *Parbathi v. Govindasami*,⁴ There the sale was set aside at the instance of the judgment-debtor on the ground of fraud and material irregularity under Order 21 rule 90 and the purchaser

Man Mohan v. Gopinath, (1918) 16 A.L.J. 511=46 I.C. 103; *Bepin Behari v. Haricharan*, (1921) 64 I.C. 628; *Dewaji v. Amrita*, (1919) 15 N.L.R. 140=52 I.C. 818; *Subba v. Ponnambala*, (1918) M.W.N. 655=49 I.C. 359; *Prasanna Kumar v. Ibrahim*, (1917) 41 I.C. 924; *Mohideen v. Mohamed*, (1912) M.W.N. 1130=17 I.C. 437; *Tirumalaisami v. Subramanian*, (1916) 40 Mad. 1009; *Govind v. Shankar*, (1917) 42 I.C. 453; *Ram Dayal v. Rampal Singh*, (1919) 22 O.C. 42=51 I.C. 95; *Habibuddin v. Hatim Mirza*, (1925) 6 Lah. 283; *Gur Prasad v. Lal Man*, (1925) Oudh. 404=88 I.C. 379. In *Muhammad Najib v. Jai Narain*, (1919) 36 All. 529, the provisions of the C. P. Code of 1882 were assumed to be applicable and it was an oversight.

1. *Tirumalaiswami v. Subramanian*, (1916) 40 Mad. 1009; *Makar Ali v. Sarfaddin*, (1923) 50 Cal. 115; *Alaii v. Venga Chetty*, (1920) M.W.N. 736=60 I.C. 66. See also *Rustomji v. Vinayak*, (1911) 35 Bom. 29; *Mohideen v. Meera*, (1912) 23 M.L.J. 487=17 I.C. 437.

2. *Sidheshwari Prasad v. Mayanand*, (1913) 35 All. 419; *Makar Ali v. Sarfaddin*, (1923) 50 Cal. 115.

3. (1917) 37 I.C. 763.

4. (1915) 39 Mad. 803.

*Parbathi v.
Govindasami.*

sued the decree-holder who brought the property to sale for recovery of poundage fee, interest, etc. Seshagiri Iyer J. said "It may be that unless the purchaser seeks the aid of the Court to set aside the sale he has no remedy against the decree-holder. It was laid down in *Dorab Ally v. Abdool Aziza*,¹ there was no warranty of title in court-sales. The right to obtain a refund consequent on a want of saleable interest in the judgment-debtor is not a right inherent in a purchaser but is the creature of a statute, but the right thus conferred can only be exercised within the limitations prescribed. Consequently without getting the sale set aside through Court the purchaser has no right of action. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given to him by the statute. But the right to recover from a party whose fraud or carelessness has led to the invalidity of the sale stands on a different footing. In such cases by neglecting the duty cast upon him, he renders himself liable to compensate the injured party for the loss the latter has sustained. This right is not created for the first time by the statute."

Where some of the judgment-debtor's properties were sold and portion of the purchase-money was drawn out by another decree-holder in rateable distribution and subsequently the sale of the portion of the property was set aside on the ground of want of saleable interest in the judgment-debtor, the purchaser bought a suit for the proportionate share of the purchase-money drawn out by the other decree-holder. It was held that assuming Article 97 applied to the case, the commencement of limitation was

1. (1878) 3 Cal. 806 P.C.

the date on which the sale was set aside and not date on which the purchaser lost possession.¹

Poundage is the fee which is levied in England by the Sheriff as remuneration for his service. In this country, as the officers of the Court conducting the sales are paid a fixed salary, a certain percentage of the purchase-money is taken for purchasing stamps. In effect the fee is the charge paid by the decree-holder for the services he obtains from the Court. In England as well as in this country this fee is taken out of the sale-proceeds. In England the Sheriff has a right of action to recover poundage fees when the sale proves abortive. The auction-purchaser whose money has been paid by way of poundage to the Sheriff will stand in his shoes to recover it from the execution-creditor.² The amount of poundage is fixed by rules made by the High Courts under section 20 of the Court Fees Act. Some of these rules provide for refund of the poundage when a sale is set aside. For instance, under the Madras Civil Rules of Practice,

“154. (1) The person appointed to sell the property shall conduct the sale in the manner prescribed by the Code for the sale of attached property, and shall out of the deposit or sale moneys, so soon as the same are received by him, purchase Court-fee stamps, to the amount of the poundage, if any payable on the sale and shall bring the same into Court forthwith, together with the balance of the deposit or sale moneys. If the applicant purchased the property with the leave of the Court, and is allowed to set-off the purchase money against any sum due to him, he shall pay the amount chargeable

1. *Bijiraj Boyce v. Raja Bijoy* (1925) 30 C.W.N. 79.

2. *Parvathi v. Govindaswami*, (1915) 39 Mad, 803.

for poundage to the person appointed to sell the property so soon as he is declared to be purchaser. The amount deducted or paid on account of poundage shall form part of the costs and expenses of the sale.

(2) Upon the completion of the sale, the person appointed to sell the property shall file in Court his report of the sale as in Form No. 58.

157. (1) If the sale is set aside under S. 310-A. (O. 21, R. 89) of the Code, the Court may make an order for payment by the judgment-debtor of the poundage, and other costs and interest, if any, not covered by the proclamation of sale.

(2) If the sale is set aside under S. 311 (O. 21, R. 90) of the Code, the Court shall determine whether any and what party is, responsible therefor, and may order such party to pay the costs and expenses of the sale, and may make an order that any other party entitled to have the property sold may have the conduct of the suit, and may make an order for the re-sale of the property.

(3) If the sale is set aside under S. 311 (O. 21, R. 91) C.P.C., the Court may make an order for payment by the execution-creditor of the poundage and other costs of the sale."¹

Where after a sale was set aside on the ground of material irregularity, the auction-purchaser applied for refund of the poundage fee from the decree-holder and the Court ordered refund from the judgment-debtor, without notice to him, it was held that the order was illegal, because the purchaser did not ask for a refund from the judgment-debtor and it was added, "It is again very doubtful whether the

1. *Parvati v. Govindaswami*, (1915) 39 Mad. 803.

judgment-debtor (who was not a party at whose instance the sale was held, though he was the person at whose instance the sale was set aside) could be considered to be a person to whom the poundage money (which is deposited in Court) has been paid" within the meaning of Order 21 rule 93 of the C.P. Code ¹

In directing repayment of the purchase-money to the purchaser under rule 93, the Court may *at its discretion* allow interest. When the sale was set aside on account of some irregularity of the mode in which the Court executing the decree published the sale, and not on account of the decree-holder's default, the Court did not allow interest.² When the purchaser asked for far more than what the defendant was liable to refund, as one who took under a rateable distribution, the Court refused interest,³ but there is no reason why the Court should not allow interest, on the sum actually decreed to be repaid. Where the decree-holder was responsible for the irregularities in the conduct of the sale, the Court awarded interest against him.⁴ The rate of interest granted is 6% only.⁵ When upon the sale in execution the purchase-money was paid to the decree-holder on a security bond and the sale was subsequently set aside the Court had power to order interest for the period for which the decree-holder

Interest.

1. *Lingam Krishna Bhupati Devu v. Jogani Venkataswamy*, (1916) 3 L.W. 105 = 33 I.C. 235.

1. *Raghubar Dayal v. Bank of Upper India*, (1883) 5 All. 364 F.B.

2. *Kishun Lal v. Muhammad*, (1891) 13 All. 383.

3. *Parvathi v. Govindasami*, (1915) 29 M.L.J. 467 = 30 I.C. 327; *Satinath v. Ratnamani*, (1917) 41 I.C. 200.

4. *Tirumalai Sami v. Subramaniam*, (1918) 40 Mad. 1009.

had the benefit of the money, though the bond did not provide for it.¹

Confirmation
of Sale.

“Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.”²

Certificate
of Sale.

“Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.”³

Effect of
Certificate.

By section 259 of Act VIII of 1859, it was declared that the certificate shall be taken and deemed to be a valid transfer “of the right, title and interest of the judgment-debtor.” Accordingly it was held that the certificate should be construed without reference to external evidence,⁴ except where the language of the certificate required elucidation.⁵ Where the description was partly accurate and partly inaccurate, the inaccuracy did not vitiate the sale;⁶ and the intention of the parties as evidenced by the execution proceedings should be looked at.⁷

1. *Maharaj Bahadur Singh v. A. H. Forbes*, (1921) 13 L.W. 217.

2. C.P.C., O. 21 r. 92 (1).

3. C.P.C., O. 21, r. 94.

4. *Mookhya Huruckraj v. Ram Lall*, (1870) 14 W. R. 435 ; *Kuleemooden v. Ashraf*, (1873) 19 W. R. 276 ; *Bissesur v. Doolar Chand*, (1874) 22 W. R. 181 ; *Pearce Mohun v. Gosto Behary*, (1876) 26 W. R. 104.

5. *Manager of Raj of Durbhangah v. Ramapat Singh*, (1872) 17 W. R. 459 ; *Barhamdeo v. Ramnarain* (1914) 19 C. L. J. 182 = 22 I. C. 280.

6. *Moola Buksh v. Kuruck Lall*, (1861) 7 W. R. 245 ; *Manson v. Golam*, (1871) 15 W. R. 490 ; *Taranath v. Joy Soonduree*, (1873) 21 W. R. 93. In *Balak Das v. Nimayee*, (1872) 17 W. R. 51 oral evidence was admitted to contradict sale certificate.

7. See *Mahabir Pershad v. Markunda*, (1890) 17 I. A. 11 (14).

Where there was a difference between the notification of sale and the sale-certificate, the conditions of the notification were said to be of superior authority,¹ but in another case it was held that when there was a difference between the order of sale and the certificate, the latter would prevail, unless the purchaser had notice of the difference.² The Privy Council ruled that the grant of the certificate did no more than create statutory evidence of the transfer in place of the mode of transfer by bill of sale,³ and it did not create a title,⁴ so in *Balwant v. Hirachand*,⁵ it was said that the certificate of sale was not conclusive evidence of as to the property purchased: "It is granted by the Court in pursuance of a duty, not to determine what property is to pass by the sale, but namely to record the already accomplished fact of a transaction that has taken place and to state what has been sold; and the Court has no more power to do more or to alter the fact of the sale, which has actually taken place." "In that case in execution of a mortgage decree the interest of five brothers was sold, but the sale certificate erroneously mentioned that the interest of only one brother was sold, the defendant subsequently obtained a wrong decree against the other brothers and purchased them with himself and took possession of their share. The plaintiff brought the suit to eject him. In giving a decree the High Court said, "Again it is urged

Effect of
Certificate.

-
1. *Uma Churn v. Gobind Chunder*, (1876) 1 C. L. R. 460.
 2. *Gowree Kumul v. Sarat Chunder*, (1874) 22 W. R. 405.
 3. *Buhans Kowar v. Buhoree Lall*, (1872) 14 M. I. A. 496 (523.)
 4. *Promothanath v. Sourar Dasi*, (1920) 47 Cal. 1108.
 5. (1903) 27 Bom. 334; *Gajanan Vasudev v. Nilo Sakharam*, (1904) 6 Bom. L. R. 864.

Effect of
Certificate.

for the respondent that even supposing the actual sale was, by the order of the Court directing it and according to the proclamation, a sale extending to the interest of all the five brothers, yet the court confirmed only the sale of Yashvant's interest. A reference, however, to sections 312 and 314 shows that it is the actual sale which the Court confirms, and not any transaction which by inadvertence, fraud or collusion may have been described in any reference to the sale made in a document subsequent thereto. For section 312 requires that if no application be made under section 311, or if any such be made and disallowed, the court shall pass an order confirming the sale as between the parties to the suit and the purchaser. A subsequent purchaser of the interest of one of the parties is therefore bound by the sale confirmed, and if the sale of that interest has been confirmed, cannot avail himself of any misstatement in a subsequent document which purports to vary the transaction confirmed. The real question in such case, under the present Code of Civil Procedure, seems therefore to be what was the sale, *i.e.*, what was bargained and paid for, and that must depend not on erroneous statements of what was offered for sale, but on what was actually offered for sale and bid for. What was offered for sale was determined by the order of the Court and the proclamation, and if the order has been carried out and the property sold accordingly that sale and nothing else must be taken to have been confirmed, whatever words of description referring to the transaction may have been inserted in the order confirming it or in the certificate stating it. There is no allegation that there is evidence, nor is there any finding, in this case that the property offered and bid for

was anything but the property ordered to be sold and proclaimed for sale; and I therefore think that the property sold to the plaintiff was the interest mentioned in the Court's order and proclamation, and that the sale of that property became absolute by the order which confirmed the sale."

Effect of
certificate.

In *Thakur Barmha v. Jiban Ram*,¹ property which was to be sold under a decree was described in the application for execution, and in the proclamation of sale subject to an existing mortgage. After the sale had been confirmed the auction-purchaser applied for a certificate of sale and alleging that a mistake had been made in the schedule by the omission of the word 'not' asked to have the certificate as a sale of the six anna share not encumbered by the mortgage. The alleged mistake was stated to have been corrected by a notification in the Calcutta Gazette before the sale. The Sub-Judge and the High Court granted the application. But on appeal the Privy Council said "that what is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely the six unencumbered annas—in a property which could not be sold in such proceeding in as much as it was the property attached. If by a mistake the wrong property was attached and an order made to sell it the only course open to the decree-holders on the discovery of the mistake was to commence the proceedings

1. (1913) 41 Cal. 590 P. C.

Effect of
certificate.

over again. They could turn an authority to sell one property into an authority to sell another and a different one."

So in *Christian v. Prasad Raut*,¹ it was said that "there is nothing in the Code which makes a certificate of sale conclusive as to the property sold and in granting a certificate it is the duty of the Court not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to take what has been sold; if the petition for execution, the writ of attachment, and the sale proclamation are clear and unambiguous, any discrepancy from the description of the property contained in these documents which occurs in the sale certificate can have no effect.

The mere fact of a sale certificate reproducing the order on a claim petition that the property is sold with notice of a claim that it is liable to a charge, will not make such charge binding on the purchaser if the claim had in fact no legal foundation. Where the charge is sought to be enforced, the said statement in the sale certificate cannot be accepted as conclusive evidence against the purchaser.²

An auction-purchaser of land is not bound by a statement in the certificate as to the situation of the land purchased by him.³ When the certificate gives the boundaries, the boundaries prevail over the areas mentioned in it.⁴ But where there is

1. (1925) 4 Pat. 760=90 I. C. 501. See also *Pettachi v. Chinnuthambiar*, (1887) 10 Mad. 241 P C.

2. *Ramachendra v. Hazi Kassim*, (1892) 16 Mad. 207; *Ganga Din v. Chet*, (1903) 6 O. C. 76 (78).

3. *Purgan Pande v. Dhanpat Tewari*, (1919) 52 I.C. 739;

4. *Gosain Das v. Mrittunjoy*, (1914) 18 C.L.J. 541=22 I.C. 26.

only a general description of the boundaries of the area sold, without any specification of the boundaries of the plot sold, the survey number of the plots must be taken as the more correct specification.¹

When property is sold in execution of a decree, ordinarily, all right, title and interest therein which the judgment-debtor had in possession, reversion, remainder, or in expectancy would pass to the purchaser, unless the Court limits the operation of the conveyance.² The plaintiff who is in possession of land on payment of consideration under a contract of sale has an interest in the property, which would be purchased in the auction-sale and the plaintiff cannot recover the property from the auction-purchaser on getting a registered conveyance from its former owner after the defendant's purchase.³ A, a legatee, under a will agreed to sell the bequeathed property to B, and received full consideration before obtaining Letters of Administration for which the execution of the deed was postponed. Meanwhile the property was attached, sold and purchased by C, who sued for possession. It was held that C, obtained the right, title and interest of A who was bound to hand over the property to B owing to the receipt of consideration before attachment and therefore C could not oust B.⁴ When an auction-purchaser is claiming

What passes by the sale.

1. *Kuppuswami v. Subbaraya*, (1912) M.W.N. 1=18 I.C. 324.

2. *Kumund Krishna Mandal v. Jogendra Nath*, (1918) 21 C.W.N. 854=44 I.C. 511; *Hasan Ali v. Azha Ral Husan*, (1919) 41 All. 45; *Babu Mahendranath v. Jadunath*, (1913) 21 I.C. 262.

3. *Jhan Chandar Das v. Rajadi Kanta Pal*, (1917) 22 C.W.N. 522=41 I.C. 850.

4. *Fakir Mahomed v. Aga Mahomed Ali*, (1911) 4 Bur. L.T. 135=12 I.C. 831.

What passes
by the sale.

possession from the persons who could claim only through one or more of the mortgagors and whose claim has been declared to be unfounded, a mistake or oversight, in omitting to include in the lands sold a certain holding, cannot affect the real substance or subject of the litigation between the mortgagors and the mortgagee.¹ Where the interest secured by a bond is sold by Court and there is no mistake as to what was sold, the fact that the date of the bond was incorrectly given would not affect the validity of the title acquired at such sale, for Order 21 rule 12 only requires a reasonably accurate description of the property sold.²

General
rule and
exceptions.

“The rule that a purchaser succeeds to the title and interest of the defendant in execution is subject to some apparent exceptions, which may all, we believe, be resolved into two classes, viz: 1. Sales in which the property sold or some interest therein is not subject to execution; 2. Sales in which the defendant has some interest which either has not been levied upon, or is not subject to levy and sale in the mode employed; and 3. Sales which do not purport to be of all the defendant's interest, and which, on the other hand, either embrace a part only, or are made subject to some supposed writ or lien. In the first class may be included all property not subject to execution in any case, or, if so subject in some cases, exempt in the particular case under consideration. In many of the States, equitable interests are not subject to execution, and therefore, in them an execution sale against a defendant who has an equitable interest only must

1. *Maung Maung v. Maung San Nyein*, (1915) 29 I.C. 17.

2. *Palaniappa v. Sadagopa*, (1911) 2 M.W.N. 133=9 I.C.

General
rule and
exceptions.

be wholly inoperative. But in those States wherein an execution sale may transfer the legal title held by a trustee, it never transfers the interest of the beneficiary, and the better opinion is that, unless the trustee has a beneficial interest in the subject of the trust, his estate is not subject to execution, and, therefore, a levy and sale, under a writ against him, transfer no title whatsoever. Though the property sold is of a class ordinarily subject to execution, the defendant may be entitled to hold it as exempt, in which case its sale under execution does not impair his title, unless he has waived his right of exemption. As instances of the second class may be mentioned a sale of personal property not present at the sale, or a sale under a writ against two or more defendants, when the interest of only one was levied upon, or when one of them held a lien by way of mortgage on the property sold. In the last case the sale would not affect the lien, because it could only be transferred by some proceeding adapted to reaching the debt, of which it was a mere incident. Cases of the third class are illustrated by sales made subject to a designated lien or condition, in which the purchaser is not at liberty to contest the lien or disregard the condition, or to a specified estate or interest, though the defendant was possessed thereof, and it might have been levied upon and sold under the writ."¹

"An execution sale, while it relates back to the inception of the lien, is not confined to the debtor's title at that time. It includes, in addition thereto, all title held by the debtor at the moment of the sale, though acquired subsequently to the levy. But if the defendant acquires title subsequently to the

1. Freeman on EXECUTIONS, III. 1936.

sale, this does not inure to the benefit of the purchaser; but it is otherwise with fixtures attached to the land after the sale, for by such attachment they become a part of the realty and pass with it on the execution of the sheriff's deed. As an execution sale and a conveyance made in pursuance thereof to necessarily have as great an effect as a quitclaim deed of the defendant in the writ, they must be operative to pass an after-acquired title when his quitclaim deed would have that effect."¹

What passes
by the sale.

"In some instances, the purchaser acquires the interest of the plaintiff as well as of the defendant. This is so whenever the title of the plaintiff is essential to accomplish the manifest purpose of the sale. Thus, if the sale is made to satisfy a lien held by plaintiff, it transfers such lien; or, in case the plaintiff held the legal title to secure the debt, the sale divests him of that also. Hence, when a sale is made to enforce a vendor's lien, the purchaser acquires the interests both of the vendor and the vendee in the land, but not the title of the vendor to unpaid notes to the purchase price, given by the vendee. So a sale under a decree foreclosing a mortgage, though it may not be effectual to divest the title of the mortgagor or his successor in interest, vests in the purchaser the title and rights of the mortgagee. Hence, after such sale, the mortgagee has no power to enter satisfaction of the mortgage or to otherwise impair the force of the assignment resulting from the sale. Other instances occur in which the purchaser succeeds to the rights and interests of both plaintiff and defendant. Thus, where the plaintiff is entitled to maintain proceedings in equity to have a transfer declared

1. Freeman on EXECUTIONS, III. 1937.

void, because made by defendant to defraud him of his debt, the purchaser at an execution sale based on such debt will be entitled to proceed in the same manner and with like effect. But, generally, the title of the purchaser is only that of the defendant in execution. If the latter is a co-tenant, the purchaser will become a co-tenant only, and his interest will be subject to the same burdens and incidents as if it had continued to be the property of the judgment-debtor. If the judgment-debtor is holding under a contract of purchase, the purchaser of his interest at an execution or judicial sale receives and must hold it subject to such contract, and, therefore, in subordination to the rights of the vendor. The title of the purchaser is subject to all equities, liens and conditions of which he had notice, and to all defects revealed by the judgment and execution."¹

What passes
by the sale.

"Judgment and execution liens attach to the defendant's real, instead of apparent, interest in the property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale. It is the duty of the purchaser to satisfy himself, prior to the purchase, respecting the title of the defendant and the sufficiency of the proceedings to transfer it, for the maxim *caveat emptor* is unquestionably applicable both to judicial and execution sales. The title acquired by a purchaser, even if the proceedings are valid, is that only to which he would succeed by a conveyance from the defendant in the writ made either at the time of the sale where it is not

*Caveat
emptor.*

1. Freeman on EXECUTIONS, III. 1939.

*Caveat
emptor*

supported by any antecedent lien, otherwise at the date of attaching the lien. If one not a party to the suit has an interest in the property, the execution sale will not defeat it, though such property was levied upon while in his possession."¹

History of the
rule.

In *Dorab Ally v. Executors of Khaja Moheedin*² the Privy Council held that "the sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor. * * * The authorities establish the proposition that "if the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he

1. Freeman on JUDGMENTS, S. 356-7; Freeman on EXECUTIONS, III. 1933-4. *Saudamini v. Krishna Kishor*, (1869) 4 B. L. R. 11 F.B.; *Doolar Chand v. Lall Chabul*, (1878) 3 C. L. R. 561 P. C.; *Barton v. Brigo Nath*, (1865) 3 W. R. 65; *Bhukhan v. Bhaiji*, (1863) 1 B. H. C. R. 19; *Sree Pershad v. Shuroora*, (1868) 9 W. R. 452; *Baluk v. Nimaye*, (1872), 17 W. R. 511; *Kushaba v. Pitambardhari*, (1875) 12 B. H. C. R. 15; *Seth Oodey v. Chaitram*, (1873) 2 Agra 125; *Jy Kishon v. Shrikur*, (1874) 3 Agra 168; *Akhe Ram v. Nand Kishore*, (1876) 1 All. 236 F.B.; *Khub Chand v. Kalam*, (1876) 1 All. 240; *Suraj Bham v. Govinda*, (1888) 1 C. P. L. R. 26; *Sobhagchund v. Bhaichund*, (1882) 6 Bom. 193 F.B. See also *Shahabooden v. Ram Gutty*, (1868) 9 W. R. 556; *Rajeeb Lochun v. Mohessuree Dossee*, (1868) 10 W. R. 365; *Gopee Lall v. Mohunt*, (1869) 12 W. R. 8; *Kelly v. Gobind Doss*, (1874) 6 N. W. P. 168; *Dhondu v. Ramji*, (1867) 4 B. H. C. R. A. C. 114; *Krishnappa v. Panchapa*, (1869) 6 B. H. C. R. 258; *Rala v. Damodar*, (1872) 9 B. H. C. R. 92; *Buta Singh v. Chattar Singh*, (1879) P. R. 131; *Kashmira Singh v. Hanmanta*, (1893) P. R. 62; *Venkatachelayya v. Nilakanta*, (1918) 41 Mad. 474.

2. (1878) 3 Cal. 806 P. C.

cannot recover the purchase-money either at law or in equity.¹ Does it govern a case in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under colour of legal process. The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a sheriff's sale has at best every inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title and interest of the judgment-debtor with all its defects; and the sheriff who sells and executes the bill of sale, is never called upon, and if called upon, would refuse, to execute any covenant of title. Therefore the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the sheriff, which are governed by rules peculiar to such sales."

Dorab Ally v. Executors of Khaja Moheedin.

So in *Hira Lal v. Karimunnissa*,² it was said that "where a sale in execution of a decree is set aside, not on the ground of wrong jurisdiction or other illegality or irregularity affecting the sale, but at the instance of a third party who has succeeded in establishing his title to it and there is no question of fraud on the part of the decree-holder, the auction-purchaser cannot sue the decree-holder for the purchase-money."

Hira Lal v. Karimunnissa.

1. But note that a covenant is implied by S. 55 (2) of the T. P. Act 1882. See *Shanto Chandar v. Nain Sukh*, (1901) 23 All. 355.

2. (1880) 2 All. 780; *Ram Narain v. Mahtab Bibi*, (1880) 2 All. 828.

*Shanto
Chandar v.
Nainsukh.*

In *Shanto Chandar v. Nainsukh*,¹ in execution of a decree for sale on a mortgage by the father of a Hindu, property of the joint family was put up for sale without specification of the interests of the other members of the family. On a suit of the sons their interest in four-fifths of the entire property was exempted. The auction-purchaser sued the decree-holder and the sons to recover four-fifths of the price paid of him. It was held that the purchaser bought the property with all risks and defects in the judgment-debtor's title except as provided by sections 312 and 315 C. P. Code, 1882, that in the absence of fraud his only remedy was to recover back his purchase-money, where the judgment-debtor had no saleable interest in the property at all and that he could not obtain a refund in proportion to the extent to which the judgment-debtor had no interest.² But as the mortgage was found to be binding on the sons, the auction-purchaser had acquired a lien on the interests of the sons to the extent of fourth-fifths of the purchase-money, which could be enforced by sale of their interests to that extent in the property exempted from sale in their favour.

*Caveat emptor
Present law.*

After the enactment of the C. P. Code of 1882 and the provision in section 313 there that a purchaser may apply to have the sale set aside on the ground that the person whose property purported to be sold had no saleable interest therein, it was

1. (1901) 23 All. 355.

2. See *Muhammad Rahmatulla v. Bachcho*, (1905) 27 All. 537; *Sundara Gopalan v. Venkatavarada*, (1893) 17 Mad. 228; *Maung Tun v. Ma Ngam*, (1908) 5 L. B. R. 58; *Sonaram Doss v. Mohiram Dass*, (1900) 28 Cal. 235; *Baijnath v. Narendra*, (1921) 19 A. L. J. 147=61 I.C. 74.

thought that the effect of the doctrine of *caveat emptor* on execution sales has been weakened.¹ *Caveat emptor.*

In *Brij Mohan Lal v. Munni Lal*,² Lindsay A. J. C. said "Whereas under the first Code of Civil Procedure, Act VIII of 1859, it was provided by section 249 that in all cases of sale a proclamation should declare that all that was to be sold was the right, title, and interest of the defendants in the property specified therein the subsequent codes, Acts X of 1877 and XIV of 1882 contain no such provision. Under section 249 of Act VIII of 1852, it might very well have been held that the declaration referred to therein amounted to a disclaimer of any warranty of title and that the purchaser took the property with all its defects. Under the present law there is no such disclaimer. The property is sold as the property of the judgment-debtor on the representation to that effect made to the Court by the decree-holder who is taking out execution. Where therefore the decree-holder pointed to a carriage as the property of the judgment-debtor which was thereupon attached and at the sale was purchased by the plaintiff's predecessor in title but subsequently on a suit brought by a third person claiming the carriage it was decreed to him and the purchaser lost it, the plaintiff was declared entitled to recover the purchase-money from the decree-holder.

Under Order 21, rule 13, C. P. Code, 1908, the decree-holder, when applying for execution has only to specify the judgment-debtor's share or interest in the property to the best of his belief and "so far as he has been able to ascertain the same" and under rule 66, the proclamation professes to

1. *Ram Kumar v. Ram Guru*, (1909) 37 Cal. 67.

2. (1912) 14 O. C. 343 = 13 I. C. 803.

*Caveat
emptor.*

specify the particulars prescribed by that rule including the property to be sold and judgment-debtor's interest therein "as fairly and accurately as possible."

In *Sree Raja Datla Venkata Suryanarayana v. Goluguri Bapiraju*,¹ the purchaser sued for recovery of his price from the decree-holder who brought the properties to sale and from the decree-holder who shared in the price by rateable distribution, on the ground of false and fraudulent misrepresentations by the decree-holders as stated in the proclamation. The claim was upheld and the learned judges said "we do not see why the acceptance of the plaintiff's bid by the officer should not have the effect of a contract with such officer, simply because the rights and liabilities arising under it are regulated in many respects by the special provisions of the Civil Procedure Code. The present suit seeking to avoid the contract by which the plaintiff became purchaser of the property on the ground of fraud committed by the appellants in connection with such sale is brought under the general law, and there is nothing in that law, as we have tried to show, which disentitles him to maintain such an action."

The result is not that there is a warranty of title by the decree-holder in execution sales. So long as he acts in good faith and apart from the decree-holder's liability for fraud or misrepresentation, the only remedy the law gives to the disappointed purchaser is for refund of the purchase money in case the judgment-debtor is found to have no saleable interest as provided by Order 21 rule 91, C. P. Code, that is, with these limitations the doctrine caveat

1. (1909) 34 Mad. 143. See also *Rustomji v. Vinayak*, (1910) 35 Bom. 29.

emptor applies to execution sales.¹ The rule caveat emptor does not apply to sales for Government revenue.² Caveat emptor.

In *Moithensa Rowthan v. Apsa Bivi*,³ it was said "it is no doubt well settled that there is no covenant for title implied in a court-sale. But this means nothing more than that the auction-purchaser takes only the interest in the property sold, which his judgment-debtor had and lost at the time of the sale. The scope of the doctrine does not extend to the consequences of defects or irregularities in the proceedings leading up to the sale, which might render it void or voidable."

The terms "right, title and interest" as used in the sale certificate or order must not be construed strictly and must be understood with reference to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place, as well as the proceedings leading up to the sale.⁴ "Right, title and interest,"

Each case must depend upon its own circumstances and "in all the cases, the inquiry has been

1. *Juglo v. Abdul Salam*, (1922) 65 I. C. 734; *Juranu Mahamad v. Jathi Mahamed*, (1918) 22 C.W.N. 760=46 I.C. 783; *Ram Dayal v. Rampal Singh*, (1919) 51 I.C. 95; *U. Paw v. N. R. M. A. Chetty*, (1921) 13 Bur. L. T. 152=61 I.C. 805; *Bipin Behari v. Haricharan*, (1920) 64 I.C. 628; *Kedarnath v. Mahanth Jagannath*, (1924) Pat. 355=74 I.C. 134; *Abinash Chandra v. Bhuban Chandra*, (1922) 25 C.W.N. 756=68 I.C. 126; *Muthusami v. Muthuveera*, (1915) 2 L. W. 517=29 I.C. 392; *Dewaji v. Amrita*, (1919) 42 I.C. 819; *Krishnaji v. Ladharam*, (1917) 42 I.C. 440; *Sukhdeo v. Rito Singh*, (1917) 2 Pat. L. J. 361=39 I.C. 263; *Subbareddy v. Ponnambala Reddi*, (1918) M.W.N. 655=49 I.C. 359; *Soolayman Cassim v. S. S. A. O. Chetty, Firm*, (1919) 12 Bur. L. T. 211=52 I.C. 174.

2. *Amar Krishna v. Abdul Jalee Mirjan*, (1917) 42 I.C. 501.

3. (1911) 36 Mad. 194.

4. *Jotenbra Mohun v. Jogul Kishore*, (1881) 7 Cal. 357; *Akhoy Kumar v. Bejoy Chand*, (1902) 29 Cal. 813. . . .

what the parties contracted about if there was a conveyance, or what the purchaser has reason to think he has buying if there was no conveyance, but only a sale in execution of a money-decree."¹ As Lord Watson said, in the case of a sale in execution of a money-decree, "the questions are what did the Court intend to sell and what did the purchaser understand that he bought."² These are questions of mixed law and fact and must be determined on the evidence in the case.³

Hindu joint family.

In *Veerabadra Aiyar v. Maraduga Nachiar*,⁴ the law was thus summarised :

"A Hindu father or manager of the family or a widow may in certain circumstances bind the entire estate by his or her dealings. The father can sell or mortgage not only his own share but that of his co-parcener sons for debts which are not shown to be immoral or illegal; the manager of the family can deal with the family property including the shares of the other members of the family for proper family purposes and a Hindu widow is entitled to sell or charge the entire interest in the family property—her own as well as that of the reversioners—for legal necessity. In any of these cases the title of the alienee cannot be impeached, nor in a case where the purchaser or mortgagee made *bona fide* enquiries and satisfied himself as to the necessity for which the alienation was made. In the case of a sale it makes no difference whether it was effected by a conveyance or took place at a court auction in execution of a

1. *Simbhunath v. Golap Singh*, (1887) 14 Cal. 572 P.C.

2. *Pettachi v. Chinnathambiar*, (1887) 14 I.A. 84.

3. *Abdul Aziz v. Appayasami*, (1903) 27 Mad. 131 P.C.; *Alagaya Goundan v. Minakshi Naidu*, (1911) 37 Mad. 22; *Sakharam v. Gitabai*, (1923) Nag. 333.

4. (1917) 34 Mad. 188 (204).

decree. When the sale is in execution of a decree, and the co-parceners or reversioners intervened in the proceedings in execution, and the question was raised and decided in their presence that their interests were also liable to be sold, they would not afterwards be allowed to reopen the question as to the character of the debts. *A fortiori* they would be precluded from raising such questions if they were parties to the suit.

In the case of a widow, if the suit for recovery of debt incurred by her husband was instituted in the life-time of her husband and revived on his death against the widow in her representative capacity, or the decree in respect of such a debt was obtained against her husband and executed on his death against the widow as representing the estate, or the decree itself was in respect of the estate and there was nothing fraudulent in the conduct of the widow, the reversioners would be concluded by the proceedings so far as the liability of their interest being sold under the decree is concerned. But it may be that even in such cases the interests of the co-parceners or the reversioner though liable to be sold were not in fact brought to sale, however strong the presumption might be to the contrary. If the co-parceners or reversioners were not parties to the suit, and the head of the family or the widow was not sued as representing the estate, and the decree was not against the estate but a personal decree, and the coparceners or reversioners were not joined in the execution proceedings, it would be open to them to contend that the judgment debt was not such that their shares or interests could be sold in execution thereof. It also seems to us that the effect of the Hindu widow.

Hindu widow. Privy Council rulings is—though it is not necessary to decide that point in the present case—that, even if the debt be found to be in fact immoral or illegal or not incurred for legal necessity, a *bona fide* purchaser of the entire interest at a sale in execution of a decree founded on that debt will be protected, if he can show that he made proper enquiries and satisfied himself as to the character of the debt though in fact he might have been deceived. However that may be, if the foundation of a decree be a debt of the proper character, for which the widow could have bound the entire interest, it is sufficiently clear, as the result of the Privy Council decisions, that even if the decree is based on the widow's contract, and does not give a charge on the husband's estate, and the reversioners had not been made parties to the suit or execution proceedings the decree-holder would be entitled to have the entire estate sold, and if in fact the entire estate was sold and bought by the purchaser, the reversioners could not defeat the purchaser. And this seems to be perfectly in consonance with the principles governing such questions. *The real question therefore in these cases is what in fact was put up for sale and sold or, putting it most in favour of the reversioner, what was liable to be sold and what in fact was actually sold.* In investigating this question the Court is not confined to any one fact. The sale certificate is no doubt the most important document as the instrument conferring title but it is not conclusive. The frame of the suit, the judgment, the decree, the execution proceedings, the advertisements for sale, the adequacy or inadequacy of the purchase money and the conduct of the parties are all circumstances which may legitimately be considered in an enquiry of this nature."

Therefore the exact interest passing at a sale Hindu widow under the words "right, title, and interest" of a Hindu widow or other limited owner in properties depends on the question whether the suit was brought against the widow on a cause of action personal to herself or upon one affecting the whole inheritance of the property in suit.¹ In the former case only the widow's interest passes, without binding the reversionary interest² and in the latter the purchaser take the entire estate.³

1. See Vol. I. 578-9. *Baijun Doobey v. Brij Bhookun*, (1875) Cal. 133 P.C.; *Jotendro Mohun v. Jogul Kishore*, (1881) 7 Cal. 357, affirmed on appeal (1884) 10 Cal. 985 P.C.; *Ray Radha Kissen v. Nauratan Lall*, (1907) 6 C. L. J. 490; *Braj Nath v. Joggeswar*, (1908) 9 C. L. J. 346=1 I. C. 62; *Giribala Dassi v. Srinath Chandra*, (1908) 12 C. W. N. 769; *Rameswar v. Provabati*, (1914) 20 C. L. J. 23=25 I. C. 84; *Trilochan v. Bakkeswar*, (1912) 15 C. L. J. 623=14 I. C. 339. See *Punit Narayan v. Raj Kumari*, (1916) 22 C. L. J. 400=32 I. C. 580.

2. *Baijun Doobey v. Brij Bhookun*, (1876) 1 Cal. 133; *Radha Mohun v. Soshi Bhoosun*, (1878) 3 C. L. J. 530; *Kristomoyee v. Prosonno Narain*, (1866) 6 W. R. 304; *Musto Parvati Bai v. Govinda*, (1889) 2 C. P. L. R. 226; *Nanhu v. Saligram*, (1902) 15 C. P. L. R. 85; [*Krito Gobind v. Hem Chunder*, (1889) 16 Cal. 511; *Braja Lal v. Jiban Krishna*, (1898) 26 Cal. 285; affd. (1903) 30 Cal. 550; cases of decree for rent] *Mahomed v. Hara*, (1912) 16 C. W. N. 1070=15 I. C. 357; *Narana Marija v. Vashera Karanta*, (1893) 17 Mad. 208; *Birj Bhukhan v. Sheoraj Narain*, (1907) 10 O. C. 159; *Bai Kandau v. Bai Jadav*, (1919) 43 Bom. 869; *Sadasiv Koer v. Ram Govinda*, (1911) 14 C. L. J. 91=11 I. C. 90; *Arjun Singh v. Bindeshri Prasad*, L. R. 3 A. 361 (tort decrees); *Punit Narayan v. Raj Kumari*, (1916) 22 C. L. J. 400=32 I. C. 580; *Kiranbala v. Kali Charan*, (1916) 32 I. C. 587; *Nabin Chandra v. Hem Chandra*, (1913) 19 C. W. N. 265=20 I. C. 248; *Bireswar Das v. Kamal Kumar*, (1912) 17 C. W. N. 337=16 I. C. 437; (decree against widow as administration); *Ishwari Prasad v. Babu Nandan Shukul*, (1925) 47 All. 563; *Nugender Chand v. Sreematty Kaminee Dossee*, (1867) 11 I. A. 241.

3. *Baroda Kanta v. Jatindra Narain*, (1895) 22 Cal. 974; *Sotish Chunder v. Nil Cemu*, (1885) 11 Cal. 45; *Jotendro Mohun v. Jogul Kishore*, (1884) 10 Cal. 985 P.C.; *Ganga Narayan v. Indra Narayan*, (1916) 22 C. W. N. 350=35 I. C. 49; *Jagernath v. Kuara*

Hindu joint family,

It is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara. In the absence of such proof whether the entire family estate has been sold or not is a question of fact in each case on what was understood to be brought and has been brought to sale.¹

So the interest of the whole joint family may pass at a sale in execution of a decree obtained on account of a joint family debt though all the members are not made parties to the suit which resulted in the sale.² Or the interest of a particular

Kuari, (1917) 37 I. C. 407. See also *Bai Jadi v. Purshottam*, (1922) Bom. 387; *General Manager of Raj Durbhanga v. Maharaja Coomar Ramaput Singh*, (1862) 14 M. I. A. 605; *Narain Bati v. Ramohari*, (1916) 1 Pat. L. J. 81=34 I. C. 734.

1. *Mahabir Pershad v. Moheswar Nath*, (1889) 17 Cal. 584 P.C.; *Bhagbat Pershad v. Girja Koer*, (1887) 15 Cal. 717 P.C.

2. *Nanomi Babuasin v. Modhun Mohun*, (1886) 13 I.A. 1; *Bissesur Lall v. Luchmeesur Singh*, (1879) 6 I.A. 233; *Purshid Narain v. Hanooman Sahai*, (1880) 5 Cal. 845; *Sheo Pershad v. Saheb Lal*, (1892) 20 Cal. 453; *Hitendra Singh v. Rameshwar Singh*, (1914) 18 C.W.N. 42=22 I.C. 873; *Sripal Singh v. Prodyot Kumar*, (1917) 44 Cal. 524 P.C.; *Madhusudan v. Iswar*, (1921) 48 Cal. 341; *Jadubir v. Gajadhar*, (1924) All. 169; *Saheb Singh v. Girdhari Lal*, (1924) 45 All. 576; *Baldeo Singh v. Hira Lal*, (1912) 9 A.L.J. 67=13 I.C. 951; *Bholajha v. Kali Prasad*, (1916) 1 Pat. L.J. 180=34 I.C. 288; *Pattabbirama v. Subramania*, (1918) 7 L.W. 438=45 I.C. 76; *Dalip v. Parmauti*, (1920) 42 All. 58; *Mohan Lal v. Bala Prasad*, (1922) 44 All. 649; *Ram Chander v. Mahomed Nur*, (1923) 45 All. 545; *Sitla Prasad v. Mt. Chameli*, (1924) All. 111; *Panaru v. Baldeo*, (1913) 21 I.C. 46; *Pokpal Singh v. Chidau Singh*, (1912) 9 A.L.J. 653=15 I.C. 903; *Dada Jinappa v. Yesu*, (1923) Bom. 450; *Madhusudan v. Bhan Atmaram*, (1913) 18 Bom. L.R. 36=18 I.C. 385; *Subramania Iyer v. Shaw Wallace & Co.*, (1920) 38 M.L.J. 402=58 I.C. 648; *Subbarao v. Swamia Pillai*,

member of the party, be he a father or other co-parcener, may alone pass by the sale.¹

When the decree-holder brought to sale and purchased the right, title and interest of a member of a joint Hindu family in execution of a personal decree against such member, he was entitled to his share only and nothing more² and the purchaser can ascertain the share by partition.³

Right to
partition

An alienee of a co-parcener's interest takes it as it stood at the time of the alienation and is not affected by subsequent births in the family.⁴

A stranger purchaser of the share of an undivided Hindu co-parcener cannot claim to be put in actual joint possession of the family dwelling house. He can either ask for delivery of possession of what he acquired by purchase or bring a suit for partition.⁵ He must sue for partition including all the parties interested and all the properties liable for

(1918) 7 L.W. 407 = 47 I.C. 834; see also *Devji v. Sambhu*, (1899) 23 Bom. 135.

1. *Radha Krishna v. Ram Bahadur*, (1918) 43 I.C. 268 P.C.; *Hanmandoss v. Valabhadas*, (1919) 43 Bom. 17; *Tammapan v. Nar Singh*, (1913) 37 Bom. 631; *Suraj Narayan v. Janholi*, (1920) 42 All. 566.

2. *Collector of Monghyr v. Hurdai Narain*, (1879) 5 Cal. 425 P.C. See also *Sambhunath v. Golap Singh*, (1887) 14 Cal. 572; *Timmappa v. Narsimha*, (1913) 37 Bom. 631.

3. *Peary Lal v. Chandi Charan*, (1907) 5 C.L.J. 80; *Madho Purshad v. Mehrban*, (1890) 18 Cal. 157 P.C.; *Suraj Bansi v. Sheo Pershad*, (1880) 5 Cal. 148 P.C.; *Deendyal v. Jugdeep*, (1878) 3 Cal. 198; *Soman Koeri v. Ram Kinker*, (1917) Pat. 128 = 38 I.C. 222.

4. *Chinna Pillai v. Kalimuthu*, (1912) 35 Mad. 47 F.B.; *Naraj Gopal v. Paragowda*, (1917) 41 Bom. 347.

5. *Grija Kanta v. Mohin Chandra*, (1916) 23 C.L.J. 587 = 35 I.C. 294; *Dularam v. Badaldas*, (1916) 10 S.L.R. 34 = 35 I.C. 478; *Medni Prasad v. Nand Keshwar*, (1923) 2 Pat. 386. See *Nadhramuni v. Appu Odayan*, (1918) 48 I.C. 799.

Right to
partition.

partition and if possible the Court will allot the alienated property to his share.¹

Where a person purchases the share of a co-parcener in certain items of joint family property and subsequently at a family partition other items are allotted to the share of that co-parcener, it is not open to the auction-purchaser to compel that co-parcener to give properties in substitution of those which had been sold at the court-sale.²

In *Ram Dullari v. Balakram*,³ A got a decree against B and brought to sale his one-sixth share. B meanwhile sued C and others for partition and got a decree that he should be given one-sixth share on paying a certain sum; this he neglected to pay and his decree remained unexecuted. A brought to sale and purchased B's one-sixth share by paying the money to be paid by B to others into Court and obtained possession. C sued for a declaration of the right and that A was not entitled possession under his purchase. It was held that A was not entitled to separate possession of the house by virtue only of his purchase at the execution sale, because what passed to him was only the right, title and interest in an undivided sixth share.

An entire joint property was first mortgaged to one person, and later on, an undefined portion of it was mortgaged to another by one branch of the joint family. In a family partition that took place

1. *Pandu v. Goma*, (1919) 43 Bom. 472; *Hanmanilas v. Valabhdas*, (1919) 43 Bom. 17; *Dhulabhai v. Lali*, (1922) Bom. 137=64 I.C. 115; *Subba Goundan v. Krishnamachari*, (1922) 45 Mad. 449; *Vanjapuri v. Pachamuthu*, (1918) 35 M.L.J. 609=15 I.C. 62; *Ishrappa v. Krishna Patta*, (1922) 46 Bom. 925.

2. *Sabapathi Pillai v. Thandavaraya Odayar*, (1920) 37 M.L.J. 620=54 I.C. 515.

3. (1915) 37 All. 120.

subsequently, the share of the mortgagors under the second mortgage became ascertained. Both the mortgagees sued upon their respective mortgages and obtained decrees for sale. Neither of them made the other mortgagee a party to his suit. The second mortgagee, in execution of his decree, purchased the property which fell to the share of his mortgagors, and obtained possession of the plaint property through Court. The prior mortgagee executed his decree later on and purchased the right and interest of his mortgagors. Notwithstanding the obstruction of the second mortgagee-purchaser, the plaint property was ordered to be delivered to the first mortgagee-purchaser. A suit was instituted for setting aside the above order and for an injunction restraining the defendant from taking possession. The lower Courts treated the suit as one for redemption. It was held that the suit could not be treated as one for redemption. The plaintiff having purchased and got into possession of the land prior to the sale to the defendant, at the date of the latter sale there remained in the mortgagors no right or interest in the land that could be sold. The defendant, as purchaser of the right and interest of the mortgagors, acquired no fresh right over and above that already possessed by him as mortgagee. The plaintiff was, therefore, entitled to the declaration and injunction.¹

Right to
partition.

A purchaser of an undivided share in ancestral property is not entitled to sue for profits accruing therefrom without bringing a suit for partition of the share purchased.²

1. *Ramanadhan Chetti v. Alkonda Pillai*, (1895) 18 Mad. 500.

2. *Sidh Gopal v. Hari Lal*, (1921) 59 I.C. 428; *Trimbak v. Pandurang*, (1920) 44 Bom. 621.

Impartible
estates.

Prior to 1889, it was the accepted law in Madras that the holder of an impartible zamindari who was himself a member of an undivided family could not alienate or encumber the corpus of the estate so as to bind his co-parceners, except for justifiable especial causes. But in the year following the ruling of the Privy Council in *Sartaj Kuari v. Deoraj Kuari*,¹ the High Court of Madras overruled these decisions and in *Rao Venkata Surya Mahipati v. Court of Wards*,² it was held that impartible Zamindaris in the Presidency of Madras are not inalienable in the absence of proof of some special family custom or tenure attaching to the Zamindari and having that effect. The reversal of the previous interpretation of the law does not, it was held, displace its application to the construction of contracts contained in certificates of sale and in 1873 and '1876 when the sales took place, the parties must be taken to be bound by the law as it was at that time understood, that the estate purchased was no more than the life-interest of the then Zamindar.³

On the question of the interest taken by a purchaser in execution sale of a decree against the holder of an impartible Zemindari in Madras in 1869 for debts (not immoral or illegal), it was held that the purchaser took the whole Zemindari and not merely the life-interest. The law in Madras in 1869 was that the holder of an impartible Zemindars was not possessed of absolute powers of disposition over the corpus, but, apart from the necessity of conforming

1. (1888) 10 All. 272 P.C.

2. (1899) 22 Mad. 383 P.C.

3. *Jadab Lal v. Debi Lal*, (1919) Pat. 426=42 I.C. 299; *Abdul Aziz v. Appayasami*, (1903) 27 Mad. 131 (135) P.C. See also *Alimonnessa v. Shamacharan*, (1905) 1 C.L.J. 176; *Pettachi v. Chinnatambiar*, (1887) 10 Mad. 241.

to the requirements of any special regulation such as Regulation XXV of 1802, he was like any other head of a co-parcenery, competent to bind the estate by debts incurred or alienations made for purposes which are regarded by the Mitakshara law as proper and justifiable.¹

When in a mortgage suit on a debt brought after the debtor's death against his widow or some of his heirs, the whole property is sold, the sale passed the entire estate, though some of the heirs were not parties to that suit. This rule applies as much to a Hindu as to a Mahomedan family. In *Davalaya v. Bhimaji*,² one Nur Sahib (a Mahomedan) mortgaged his property in 1862 to Bhimaji and died in 1864 bearing a widow, a son and two daughters. In 1864 Bhimaji sued the son represented by his mother and obtained possession under the decree. In 1890, the daughters brought the suit to redeem the mortgage of 1862, because they said they were not parties to that suit of 1864, but it was held they were bound by the decree. If the creditor of the deceased can seek his relief against one of several coheirs in a case where all the effects of the deceased are in the hands of that heir, it makes no difference whether the heir meets the demand by a voluntary sale or the property is brought to sale in execution of a decree obtained against him.³

Muhamadan
debtor.

When the debt for which the house is sold was contracted by the husband, the widow's right of residence will give place to the superior

Right of
residence.

1. *Arulappa Naicker v. Murugappa Chettiar*, (1912) 23 M.L.J. 658=18 I.C. 49.

2. (1895) 20 Bom. 338.

3. *Pathumabi v. Vittal Ummachabi*, (1902) 26 Mad. 734. See *Madhanmal v. Sirdar Bibi*, (1909) 2 S.L.R. 76.

Right of
residence.

right of the creditor and the purchaser is entitled to possession free from the widow's right of maintenance.¹ If the debt was not one binding on the family or binding on the mother and the sons, a sale under a decree against the son can only be subject to the mother's right of residence.² The same rule applies to the right of residence of a coparcener's widow,³ or unmarried sisters of the judgment-debtor.⁴ The right of residence of Hindu females is ordinarily referable to the family house and a purchaser may be presumed to have notice of that fact. It is reasonable to hold that he is not a bonafide purchaser entitled to eject her, unless it is proved that the sale is valid against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her.⁵

Insolvency
etc.

In cases where the right of inheritance really vests, the purchaser of the right of a deceased judgment-debtor whose representatives hold under a certification does not acquire the entire estate, but acquires it subject to all legal and equitable rights of inheritance.⁶ A life-interest in the residue of the

1. *Jayanti Subbiah v. Alamelu*, (1902) 27 Mad. 45; *Nihal Devi v. Shib Dial*, (1908) P.L.R. 11; *Ram Mal v. Mussammatt Miran*, (1896) P.R. 30; *Manilal v. Bai Tara*, (1893) 17 Bom. 398. See *Olagayee v. Pichammal*, (1911) 21 M.L.J. 303=9 I.C. 524; *Bhagat Singh v. Dam Prakash*, (1922) 69 I.C. 602; *Ramzan v. Ram Daiya*, (1918) 40 All. 96; *Gungabai v. Jankibai*, (1920) 44 Bom. 377.

2. *Venkatammal v. Andyappa*, (1882) 6 Mad. 130. See *Assa Debi v. Bashi Ram*, (1920) 56 I.C. 198.

3. *Kisandas v. Rangubai*, (1906) 9 Bom. L.R. 382.

4. *Suryanarayana Rao v. Balasubramania*, (1920) 43 Mad. 635.

5. *Ramanadan v. Rangammal*, (1888) 12 Mad. 260 F.B.

6. *Sham Coomar v. Juttun Bibee*, (1870) 14 W.R. 448; *Rai Kristo v. Bungshee*, (1870) 14 W.R. 448 note.

real and personal property of a testator after all the charges on it have been satisfied and provided for, and after a full administration has taken place of the assets, cannot be sold and therefore the sale passes nothing to the purchaser.¹ Where the property of an insolvent is attached in execution of a decree against him during the pendency of an insolvency petition and the attachment is not withdrawn at the time of the vesting order, but the petition is subsequently dismissed, a sale in pursuance of the attachment is not void as against trustees to a composition deed executed by the insolvent on the date of the dismissal of the petition, since the attachment was good, if not from the date of its issue, at least from the date of the discharge of the vesting order.² The effect of the dismissal of the petition is to nullify the vesting order altogether and to re-vest the property in the insolvent retrospectively from the date of the vesting order. When therefore a composition scheme was effected after the vesting order before the dismissal of the petition, the property vested in the trustees under the deed and an attachment of the property at the instance of a creditor after the composition, though after the dismissal, cannot prevail against the trustees. A judgment-creditor can attach and sell only such property as the judgment-creditor could honestly sell. If at the attachment his estate had vested in insolvency in the Official Assignee, there could be nothing remaining afterwards for a creditor to attach and sell. If a sale goes on, the purchaser gets nothing.³

Insolvency
etc.

1. *Tokai Sherob v. Davod Mullick*, (1856) 6 M.L.A. 510.

2. *Ramasami v. Murugesu*, (1897) 20 Mad. 452.

3. *Kothandaram v. Murugesu*, (1903) 27 Mad. 7; *Sardarmal v. Aranvayal Sabapathy*, (1896) 21 Bom. 205.

Purchaser's
title.

Where mortgaged property is sold in execution of a mortgage decree for paying off the mortgage debt, the interest of the mortgagor as well as of the mortgagee pass to the purchaser.¹ The mortgagee is estopped from disputing that such is the effect of the sale so far as his interest is concerned, although the Court may only have described the sale as one of the right, title and interest of the mortgagor.² What passes to the purchaser is the right, title and interest of the mortgagor as it stood when he was making the mortgage and not as it stood at the time of the court sale.³ In the case of a sale on a money decree, the interest of the judgment-debtor alone passes.⁴

An auction-purchaser under a defective execution sale who obtains possession would have a good title until the defect is discovered and if not challenged within the time allowed to set aside the sale, his title would become absolute; but if he does not get possession, his title would be open to any objection that may be taken by the person in possession.⁵

Tacking of
possession.

The purchaser can tack on the possession of the judgment-debtor or of the decree-holder, and

1. *Muthora Nath v. Chundermoney*, (1879) 4 Cal. 877; *Nagammal v. Venkatagiri*, (1898) 8 M.L.J. 298.

2. *Khivraj v. Lingaya*, (1873) 5 Bom. 2; *Seshagiri v. Salvador*, (1873) 5 Bom. 5; *Maganlal v. Shakra*, (1898) 22 Bom. 945.

See also *Ramchandra v. Jairam*, (1879) 22 Bom. 686; *Balmukundas v. Moti Narayan*, (1893) 18 Bom. 446; *Ram Ratan v. Ratin Lal*, (1905) 2 N.L.R. 106.

3. *Brajarai v. Mohammad*, (1868) 10 W.R. 151; *Shaik Abdulla v. Haji Abdulla*, (1880) 5 Bom. 8; *Dadoba v. Damodar*, (1891) 16 Bom. 486; *Shringarpura v. Pethe*, (1878) 2 Bom. 662; *Gajadhar v. Mulchand*, (1888) 10 All. 526.

4. *Maganlal v. Shakra*, (1898) 22 Bom. 945.

5. *Shankar Daji Naik v. Dattatreya*, (1921) 45 Bom. 1186.

assert adverse possession against a stranger. The purchaser acquires the right, title, and interest of the judgment-debtor and in virtue of that is put in possession by reason of which he becomes liable to be sued by the true owner. He derives therefore such liability within the meaning of section 3 of the Limitation Act from or through the judgment-debtor. On 7th December 1871 R sold certain immoveable property to the plaintiff but he continued in possession. On 18th June 1872 those properties were sold in execution of a decree against R and were purchased by A. The plaintiff brought a suit against R on 7th December 1883 for recovery of possession of the properties sold to him and on 17th January 1884, A was made a co-defendant. It was held that A was entitled to add to the period of his possession that of R, who had remained in possession after the sale to the plaintiff and the plaintiff's claim against A was time-barred.¹

Tacking of
possession.

The auction-purchaser is entitled to possession from the date of the confirmation of sale and limitation starts against him from that date.² Under the C. P. Code, 1908, the property sold vests in the purchaser from the date of the sale. Where, therefore, a female institutes a suit for maintenance subsequently to the sale but the prior to the date of the grant of the certificate, the sale is not vitiated by the doctrine of *lis pendens* and the purchaser takes the property free from any charge of maintenance.³ The purchaser will now be entitled to profits

Date of
vesting.

1. *Ali Saheb v. Kaji Ahmed*, (1891) 16 Bom. 197.

2. *Mohima Chunder v. Nobin Chunder*, (1895) 23 Cal. 49 (over-ruled on other point in *Sati Prasad v. Jogesh Chunder*, (1904) 31 Cal. 681 F. B.) *Narasingarji v. Panuganti*, (1921) M. W. N. 579. See also Articles 137 and 138 of the Limitation Act, 1908.

3. *Lanka Gopalram v. Lanka Ratnamma*, (1915) 26 I.C. 353.

Right to
trees etc.

from the date of sale.¹ He is entitled to the crops on the land cut and uncut.² The doctrine of emblements has no application to the case of a mortgagee who sues on his mortgage and in execution of the decree sells the land and subsequently sues the purchaser for the value of the standing crops grown by him, which were not expressly reserved at the sale or in the notice of sale.³ When trees are sold on execution, the sale passes the right of the judgment-debtor and the judgment-debtor cannot claim any shade right in respect of those trees.⁴ He is entitled to the trees severed, from the land and to the buildings thereon,⁵ unless excluded from the sale,⁶ and to a right of easement, as if the property has been voluntarily sold.⁷

The purchaser cannot seek to recover what the judgment-debtor could not,⁸ and is subject to

1. *Bhawani Kumar v. Mathura Prasad*, (1912) 40 Cal. 89; *Umesh Chunder v. Zahur*, (1891) 18 Cal. 164 P. C. See *Krishna Gopal v. Hem Chandra*, (1918) 46 I. C. 908.

2. *Land Mortgage Bank of India Ltd. v. Vishnu Govind*, (1878) 2 Bom. 670; *Hashmat Ali v. Mahewa Estate*, (1918) 5 O. L. J. 31=45 I. C. 248; *Afatoolla v. Dwarknath*, (1879) 4 Cal. 814 (unless there is a custom to the contrary); *Narbadapuri v. Bholanath*, (1901) 15 C. P. L. R. 141 (suit for foreclosure.)

3. *Ramalinga v. Samiappa*, (1889) 13 Mad. 15; *Dhobi Roy v. Mahadev*, (1923) Pat. 355.

4. *Gangaram v. Yashodabai*, (1917) 13 P. L. R. 163=42 I. C. 261.

5. *Fargeer v. Khunderun*, (1870) 2 N. W. P. 251; but see *Chutoorbhooj v. Villaet Ali*, (1864) W. R. 223; *Addool v. Dataram*, (1864) W. R. 367.

6. *Abuttusan v. Ramzan*, (1882) 4 All. 381; *Sakhawat v. Muhammad*, (1916) 38 All. 59. See also *Durga Singh v. Bisheshar*, (1898) 24 All. 218; *Hasan Ali v. Azha Rut Husan*, (1919) 41 All. 45.

7. *Hurce Madhub v. Hem Chunder*, (1874) 22 W. R. 522.

8. *Zahim v. Choonee Lal*, (1875) 4 Agra 194; *Lalla Ram v. Lokebas*, (1872) 18 W. R. 39.

the bar of limitation against him.¹ He is bound by all liens, mortgages and leases existing.² So where the property is purchased at a sale in execution of a money-decree with notice that another person has obtained a decree enforcing a lien upon it, the purchaser cannot maintain his possession against another purchaser of the same property in execution of the decree enforcing the hypothecation.³ He takes subject to all equities affecting the judgment-debtor and will be bound by constructive notice in the same way as an ordinary purchaser.⁴

Liability for
rent etc.

Where the same property was purchased by two different persons in execution of two different decrees against the same judgment-debtor, and while the prior purchaser applied for and got a sale certificate in respect of his purchase only after the same was obtained by the later purchaser, it was held that the prior purchaser had obtained an equitable interest in the property by the sale, though the certificate was not yet issued and that the later purchaser must be held to have purchased the property subject to such equitable interest and that the prior purchaser having subsequently completed his title by obtaining a sale certificate, was entitled to recover possession from the later purchaser.⁵ He

1. *Shridhar v. Babaji*, (1869) 6 B. H. C. R. 220; *Rajah Enayet Hossin v. Gridharee Lal*, (1869) 12 M. I. A. 366.

2. *Oojagur Roy v. Ram Khelawan*, (1868) 10 W. R. 384; *Land Mortgage Bank v. Ram Ruttun*, (1874) 21 W. R. 270; *Sobhagchand v. Bhaichand*, (1882) 6 Bom. 193 F. B.; *Bapuji v. Satyabhamabai*, (1882) 6 Bom. 490; *Rupchand v. Davlatram*, (1882) 6 Bom. 495; *Dadoba v. Damodar*, (1881) 16 Bom. 486; *Kishan Lal v. Ganga Ram*, (1890) 13 All. 28.

3. *Sheoratan v. Chetey Lall*, (1881) 3 All. 647 F. B.

4. *Ram Lochan v. Ramnarain*, (1877) 1 C. L. R. 296; *Yeshwant v. Govind Shankar*, (1886) 10 Bom. 453.

5. *Konapa v. Janardar*, (1874) 11 B. H. C. R. 193; *Yeshwant v. Govind*, (1886) 10 Bom. 453. See also *Chintamanrav v.*

Liability for
rent, etc.

is liable for rent,¹ and revenue,² from date of sale and cesses do not become due from day to day but at certain specified time, according to the contract of the parties or the custom prevailing in the locality. When such payments do not become due until after a purchaser in execution purchases the estate, the doctrine neither of contribution nor of apportionment applies, but he is liable to discharge the whole amount of the payments and cannot make the judgment-debtor pay any portion of them, whether in arrears accruing and unless he pays the same, he will lose his purchase.³

For rents accruing due between the date of sale and its confirmation, it is the auction-purchaser who purchases in execution of a rent decree and not the judgment-debtor that is liable.⁴ If the property is sold for arrears of revenue accruing due between these two dates, the purchaser will lose it completely and cannot even enforce his mortgage right against the purchaser at the revenue sale.⁵

Mortgage
decree.

When property is sold under a decree obtained on a mortgage-bond, the purchaser does not purchase merely the rights and interests of the debtor, but the right which the mortgagee brings to sale

Vithabai, (1887) 11 Bom. 588; *Dagdu v. Pancham Singh*, (1892) 17 Bom. 375; *Bhawani v. Mathura*, (1907) 7 C. L. J. 1; *Sanwal Singh v. Prag Dutt*, (1914) 25 I. C. 8:

1. *Obhoy v. Nilambur*, (1864) W. R. 72; *Thoda v. Degumbree*, (1864) W. R. 207. See also *Faez v. Ramsukh*, (1893) 21 Cal. 169 and *Hara lhan v. Kartik Chandra*, (1902) 6 C. W. N. 877.

2. *Chatraput v. Grinda Chunder*, (1880) 6 Cal. 389. See *Prem Chand v. Purmima*, (188) 15 Cal. 546; *Bhyrub v. Soudamini*, (1876) 2 Cal. 141 F. B.

3. *Chatraput v. Grinda Chunder*, (1880) 6 Cal. 389.

4. *Bejoy Chand v. Shashi Bhushan*, (1914) 18 C.W.N. 136 = 23 I.C. 101.

5. *Bhawani Kumar v. Mathura Prasad*, (1912) 40 Cal. 89. See *Balli Singh v. Bindeswari*, 35 I.C. 532.

under his decree.¹ A prior mortgagee who had purchased the equity of redemption in execution of a simple money-decree is entitled to redeem a subsequent mortgage which was created prior to the purchase.²

Where property which was mortgaged first to A, and then to B, was first sold in execution of a money decree obtained by B for his debt, and subsequently, A also having obtained a money decree caused the rights and interests of the mortgagor to be again sold. It was held that the purchaser under the second sale did not get the estate, but only his judgment-debtor's right, title and interest, which had become extinct by reason of the first sale, and that he could not sue for possession of the property itself.³ When the property in dispute was mortgaged first to M, then to M and S and then to the appellant, and M brought a suit for sale upon the first mortgage, obtained a decree, sold the property and purchased it himself, and M and S then brought a suit upon the second mortgage and obtained a decree, to which suit the appellant was a party, it was held that M and S could again sell the property which was sold in execution of the decree on the first mortgage, inasmuch as M, by his purchase, did not become full owner, as the property was subject to two other mortgages.⁴

1. *Prahlad Misser v. Udit Narayan*, (1868) 10 W.R. 291; *Narain Sahoo v. Ochoot Sahu*, (1870) 14 W.R. 233; *Tanjore Palace Estate v. Thiyagaraja*, (1923) Mad. 160; *Sohan Lal v. Jot Singh*, (1913) 16 O.C. 148 = 20 I.C. 458.

2. *Mangali Prasad v. Pati Ram*, (1904) 1 A.L.J. 360. See also *Eursappa Mudaliar v. Commercial and Land Mortgage Bank Ltd.*, (1900) 23 Mad. 377.

3. *Durpo Narain v. Nuleetah Soonduree Doss*, (1869) 11 W.R. 332.

4. *Murlidhar v. Sher Singh*, (1906) 3 A.L.J. 238.

Rival
purchasers.

A mortgagee purchasing the property in execution of his mortgage-decree has priority over a prior purchaser in execution of a money-decree against the judgment-debtor obtained during the pendency of the mortgage suit.¹

Right of
redemption.

Where in execution of a decree on a puisne mortgage to which the prior mortgage was not made a party, the property is purchased at court-sale, the right of the purchaser when impleaded in a suit by the prior mortgagee is only for redemption.² It is the same when a purchaser under a decree on the prior mortgage to which the puisne mortgagee or a purchaser under a puisne mortgage was not a party sues for possession.³

1. *Ram Doyal v. Ram Tanu*, (1911) 15 C.L.J. 137=11 I.C. 464. See also *Kunj Behari v. Ram Sahai*, (1915) 2 O.L.J. 327=30 I.C. 213; *Abdul Majid v. Abdul Majid*, (1910) 4 Bur. L.T. 44=9 I.C. 772; *Chaman Lal v. Kamaruddin*, (1922) Pat. 655; *Veyindra Muthu Pillai v. Mayanadan*, (1920) 43 Mad. 196 (though mortgage suit was instituted after attachment under a money decree). See also *Pranjivan Govardhandas v. Bajju*, (1880) 4 Bom. 34.

2. *Thakurdas v. Gangaram*, (1908) 1 S.L.R. 172.

3. *Muhammad Samiuddin v. Mansingh*, (1886) 9 All. 125; *Gajadhar v. Mulchand*, (1888) 10 All. 520; *Namdar Chaudhri v. Karam Raji*, (1891) 13 All. 315; *Baldeo v. Esshiar Singh*, (1895) A.W.N. 45; *Dullabhadas v. Lakshmandas*, (1886) 10 Bom. 88; *Mohan Manor v. Togu Uka*, (1886) 10 Bom. 224; *Dadoba v. Damodar*, (1892) 16 Bom. 486; *Desai v. Mundas*, (1895) 20 Bom. 390; *Jugdeo Singh v. Habibulla*, (1907) 6 C.L.J. 612=12 C.W.N. 107; *Mulla Veetil v. Achutan Nair*, (1911) 21 M.L.J. 213=9 I.C. 513; *Jawahir Singh v. Rajendra*, (1907) 12 O.C. 133=2 I.C. 136; *Kadir Buksh v. Jwala Prasad*, (1906) 1 A.L.J. 288; *Wahidunnissa v. Gobardhan Das*, (1900) 22 All. 453; *Shrikisan v. Gadadher*, (1899) 12 C.P.L.R. 125; *Gangaram v. Tikasham*, (1898) A.W.N. 184; *Protap Chandra v. Ishan Chandra*, (1900) 4 C.W.N. 266; *Ramnath v. Brahmamoyi*, (1903) 1 C.L.J. 537; *Charni v. Raj Bahadur*, (1909) 2 I.C. 495; *Ram Narain v. Bandi Pershad*, (1904) 31 Cal. 737; *Rangayya v. Parthasarathy*, (1897) 20 Mad. 120; *Cangayam Venkataramana v. Henry Sameo Colley*, (1908) 31 Mad. 425; *Rangasamy v. Komarammal*, (1903) 26 Mad. 484; *Rebati Mohan v. Nadiabashi Den*, (1918) 28 C.L.J. 256=44 I.C. 521.

In the case of a mortgage executed by a Hindu father, his sons, if they been not parties to the creditor's suit for sale and do not impeach the validity of the mortgage, can only claim to be afforded an opportunity to redeem the mortgage before or after the sale.¹ Where a mortgagee purchases a mortgaged property in execution of the mortgage decree in his favour and is resisted by an alleged purchaser from the mortgagor in getting possession his remedy lies in a suit for possession against the purchaser giving him an opportunity to redeem his mortgage. He can sue the purchaser on the mortgage if he is in time.² Where there were two mortgages of the same property to different persons on different dates, and the second mortgagee brought a suit on his mortgage without impleading the former mortgagee, and purchased the property in execution of the decree therein, and the first mortgagee who had also sued on his mortgage and obtained a decree for sale, brought the present suit against the previous auction purchaser for a declaration that the property might be sold, it was held that the plaintiff's suit should be allowed, but that the decree should be passed reserving a right to the defendant, *i.e.*, the previous purchaser under the second mortgage, of redeeming the first mortgage within a certain fixed time.³ One K. M. held a simple mortgage over cer-

Right of
redemption.

1. *Bhawani Prasad v. Kallu*, (1895) 17 All. 537; *Lala Suraj Prasad v. Golab Chand*, (1901) 28 Cal. 517; *Muthuraman v. Ettappasami*, (1899) 22 Mad. 372; *Jagan Nath v. Budhwa*, (1907) P.R. 2. See also *Dharam Singh v. Angan Lall*, (1899) 21 All. 301; *Shanto Chandar v. Nam Sukh*, (1901) 23 All. See also (1906) 2 N.L.R. 90 and (1906) 2 N.L.R. 116.

2. *Badam Kumari Dasi v. Hari Dasi*, (1911) 16 C. L. J. 33 = 11 I. C. 74; *Hajrabibi v. Shiam Narain*, (1913) 11 A. L. J. 362 = 20 I. C. 184.

3. *Kanhaiya Lal v. Bansidhar*, (1884) A. W. N. 136.

tain land and a subsequent usufructuary mortgage comprising the same land. He brought a suit for sale on the simple mortgage and had the mortgaged property sold, notifying his lien under the usufructuary mortgage. The mortgaged property was purchased by one H. S. who, being refused possession, sued the mortgagor and the mortgagee for recovery of possession of the property purchased by him. It was held that H. S. was entitled to possession and that K. M. if under the circumstances he had any remedy at all, had no more than a right to redeem the plaintiff as a purchaser under the decree on the first mortgage.¹

Mortgagee-
purchaser.

Where, prior to the sale in execution of his mortgage-decree, a mortgagee purchases the equity of redemption in the mortgaged property in the name of a benamidar, his subsequent purchase of a property at a sale held in execution of his mortgage-decree can pass no title to him.² A obtained two decrees of different courts on separate bonds mortgaging the same property, and purchased the property himself in execution of one of his decrees. The surplus of the sale proceeds was distributed by the Court among other persons holding money-decrees against the judgment-debtor. It was held that the decree-holder could not, afterwards, execute the second decree against the judgment-debtor's property not included in the hypothecation.³

In *Chinnu Pillai v. Venkatasamy*,⁴ the suit was to recover a sum of money due on a mortgage

1. *Harnam Singh v. Bishan Singh*, (1894) A. W. N. 136.

2. *Chutterput Singh v. Maharaj Bahadoor Singh*, (1905) 32 Cal. 198 P. C.

3. *Ballam Das v. Amar Raj*, (1890) 12 All. 537.

4. (1915) 40 Mad. 77. See *Lachmi Narain v. Hirdey Narain*, (1926) 24 A.L.J. 661.

bond, dated 3rd September 1900, executed by the 1st defendant in favour of one R and transferred eventually to the plaintiff. There were two prior mortgages executed by the 1st defendant in favour of two other persons on the 4th October 1894 and the 26th June 1895, respectively. A suit for sale was brought by the second mortgagee on his mortgage bond, dated the 26th June 1895, a decree was obtained and the property of the first defendant was sold in execution of the decree and eventually purchased by the second defendant. But the third mortgagee or his transferee now represented by the plaintiff was not joined as a party to the suit. The second defendant subsequently redeemed the first mortgagee who claimed under the mortgage bond, dated the 4th October 1894, and had also obtained a decree on his mortgage. The second defendant contended *inter alia* in the present suit instituted by the plaintiff on the third mortgage, dated 3rd September 1900, that the plaintiff was not entitled to sue for sale subject to the prior mortgages of the years 1894 and 1895 which had become vested in him (the second defendant) by the purchase and redemption above stated, but that the plaintiff could only redeem the first two mortgages and then bring to sale the mortgaged property for the discharge of all the three mortgages in their order. The Subordinate Judge held that the properties should be sold and that the proceeds should be applied first in payment of the first two mortgages aforesaid, and the balance, if any, should be applied towards the discharge of the suit mortgage. Against this decree, the second defendant preferred an appeal to the High Court.

Chinnu
Pillat v.
Venkatasamy.

Srinivasa Iyengar J. summarised the law thus :

*Chinnu
Pillai v.
Venkatasamy.*

Taking then two simple mortgagees, their rights and liabilities will be as follows :—

(1) If the second mortgage sues first, he can without making the first mortgagee a party, sell the property subject to the first mortgage; the purchaser will become the owner of the equity of redemption instead of the mortgagor but subject only to the first mortgage as the second mortgage is extinguished by the sale. The first mortgage can sue to recover his mortgage-money by sale without making the second mortgagee or the mortgagor a party but only the purchaser. If he wants a personal decree against the mortgagor, he can also be joined in the same suit.

(2) If the second mortgagee sues first, he can join the first mortgagee and redeem him and sell the property and realize the amount due on both the mortgages.

(3) If the second mortgagee sues first, he can join the first mortgagee and with his consent ask for a sale of the property free of all encumbrances. The sale proceeds will be distributed according to priority.

(4) If the second mortgagee sues first without making the first mortgagee a party, the first mortgagee may in execution of the first decree require the property to be sold free of his mortgage and if the amount due to him is admitted the Court can order a sale free of all incumbrances.

(5) If the second mortgagee sues first without making the first mortgagee a party, the first mortgagee can, while the first suit is pending, sue for sale making the second mortgagee and the mortgagor a party in which case there can be no sale in the first suit and if there had been a sale pending the

first mortgagee's suit, the purchaser will be affected by *lis pendens*. He can redeem the first mortgagee in which case there will be no sale in the first mortgagee's suit or if there is a sale, can claim the balance of the sale proceeds after payment to the first mortgagee, as both the second mortgagee and the mortgagor must be presumed to have obtained the value of their interests in the property out of the sale proceeds in the first sale. In this case, the purchaser under the second sale gets the property and is entitled to possession against the first purchaser.

*Chinnu
Pillai v.
Venkatasamy.*

(6) If the first mortgagee sues first, making the second mortgagee a party as he ought, there cannot be a trial of a further action.

(7) If the first mortgagee sues first without making the second mortgagee a party, the second mortgagee is not affected and can bring his own action for sale making the mortgagor a party if there had been no sale in the first mortgagee's suit, or if there had been a sale making the purchaser a party in his capacity of the ultimate owner of the equity of redemption; and the purchaser in the second mortgagee's execution sale gets a good title to the property. He is not affected by any *lis pendens*, while any purchaser in the first mortgagee's sale would be.

An auction-purchaser of the interest of a simple mortgagee in a suit in which a puisne usufructuary mortgagee is not a party cannot claim possession as his rights are not higher than those of the plaintiff mortgagee.¹ The mortgagee purchaser in an auction in a suit against the mortgagor without impleading

1. *Sheo Indar Bahadur Singh v. Ghazi-ud-din*, (1916) 18 O. C. 347=33 I. C. 243.

Right to
possession.

the auction-purchaser of the mortgagor's right, is not entitled to eject the latter in a suit for possession.¹ Where separate suits are filed by the 1st and 2nd mortgagees respectively neither impleading the other and each brings the property mortgaged to him to sale, the present right of possession and enjoyment passes to the purchaser and the right cannot be sold again. If a puisne mortgagee impleads the prior mortgagee the Court should not ordinarily permit a sale subject to the first mortgage for it is the duty of the Court to make a decree which shall deal finally with the question between the parties. If the sale under the second mortgage is made subject to the decree for sale obtained under the first mortgage the first mortgagees have a right to bring the property mortgaged to them to sale free of all encumbrances. If the equity of redemption only has been sold the purchaser must to prevent a further sale redeem the first mortgage.²

A second mortgagee in possession under a mortgage which entitles him to possession cannot be lawfully ousted by his mortgagor or by the first mortgagee or by a purchaser at a sale under a decree in a suit of the first mortgage to which he was not a party. The purchaser in such a suit, whether he is a first mortgagee or a stranger, does not get the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of suit. Therefore, a puisne mortgagee's suit for a declaration that the purchaser in the first mortgagee's suit is not entitled to disturb his possession, without asking for further relief, is maintain-

1. *Bhabhuti Rai v. Harbans Rai*, (1914) 25 I. C. 1; *Har-gulab v. Gobind Roy*, (1897) 19 All. 541; *Mandan Lal v. Bhagwandas*, (1899) 21 All. 235.

2. *Bumandis v. Hirachand*, (1913) 12 S.L.R. 1=47 I.C. 792. See *Ram Jhari v. Kasinath*, (1926) 94 I. C. 284

able.¹ The possession of the purchaser at a sale by a mortgagee in execution of the decree in a suit brought by him on his mortgage, the owner of the equity of redemption not being a party to the proceedings, is not the possession of an owner of all the interests in the property. He buys subject to the equity of redemption, and therefore by virtue of his purchase only steps into the shoes of the mortgagee. Where the mortgagee would be barred by limitation from bringing a suit to obtain possession or to have the property sold to realise the mortgage amount the purchaser would be equally barred. If the auction-purchaser did not get possession he was bound to take proceedings to obtain the benefit of his purchase and he could not get possession unless he had that right as a successor to the original mortgagee.²

Of two auction-purchasers, purchasing the same property sold simultaneously in execution of two mortgage-decrees, the one who purchases in execution of the decree enforcing the earlier mortgage has a prior right to possession over the other.³ A purchaser at a sale held in execution of a decree for sale on a first mortgage made by a person in possession of the property, the decree having been obtained in a suit brought in strict accordance with S. 85, Transfer of Property Act, is entitled to possession as against a purchaser at an earlier sale held in execution of a decree for sale obtained in a suit brought on a second mortgage in defiance of the rule laid down in that section.⁴

1. *San Bwin v. Nagamutu*, (1915) 8 Bur. L. T. 261=30 I. C. 710.

2. *Dattatraya Mangeshaya v. Venkatesh Vasudeo*, (1922) Bom. 334=24 Bom. L. R. 741.

3. *Janki Das v. Badrinath*, (1880) 2 All. 698.

4. *Fayaz Hossein Khan v. Prag Narain*, (1904) 7 O. C. 243.

*Lutf Ali
Khan v.
Futteh
Bahadur.*

In *Lutf Ali Khan v. Futteh Bahadur*,¹ decrees having been obtained on two mortgages of the same property created at different times (the terms of the first decree giving effect to a compromise between the mortgagor and the first mortgagee), sale in execution followed, but before the sale under the decree on the first mortgage was effected, the sale under the decree on the second took place, the possession remaining with the purchaser at the first sale acting *benami* for the mortgagor. In a suit for possession brought by the plaintiff a purchaser at the subsequent sale under the decree on the first mortgage, it was held (a) that the judgment of the High Court incorrectly treated the plaintiff as mortgagee, refusing him a charge for the full amount of his purchase-money, (b) that it would be contrary to equity to allow the mortgagor to set up any right to possession as acquired by his purchase, and (c) that the plaintiff, as against him, was entitled to a decree for possession as purchaser.

*Ganapat Lal
v. Bindbasini
Prasad.*

In *Ganapat Lal v. Bindbasini Prasad*,² in a suit for sale under a mortgage, the mortgagee did not implead certain persons interested in the mortgaged property. A decree was passed and under it the property was purchased by the mortgagee. In a suit for declaration by persons who should have been impleaded that their right to redeem was not extinguished it was held that after the sale the mortgagee held as purchaser and was entitled to raise all the defences that belonged to him as such, that unless the claim to set aside the sale were made in a properly constituted suit and properly raised, the Court could not interfere with

1. (1890) 17 Cal. 23 P.C.

2. (1920) 47 Cal. 924 P. C.

the possession which had vested in him with the purchase.

In a suit by a prior mortgagee A, against a mortgagor and a subsequent mortgagee B, a decree for sale was passed in July 1907 with the consent of A subject to the subsequent mortgage right of B. In execution of that decree the mortgaged properties were sold and purchased by A himself on 5-11-1909. A obtained delivery of the properties in March 1920. Subsequent to the date of the decree in A's favour B brought a suit on his mortgage against the mortgagor and A in which the latter claimed priority over B's mortgage. A decree was passed in that suit on 23-8-1910 directing the plaint property to be sold "subject to the priority of A to the extent of the amount declared due to him under his decree." In 1916 the final decree on the suit was passed and the mortgaged properties were again sold in execution thereof and purchased by B himself in October 1917. On 5-2-1919 B got delivery of the properties dispossessing A. On an application by A under Order 21 rule 100 C. P. Code for restoration of possession, it was held he was not entitled to possession as against B. Sadasiva Iyer J. said if A was not bound by B's decree and B by A's, A's first purchase would give him the right to possession against B. But each having been impleaded in the other's suit, both are bound by both decrees and on the principle that when the rights obtained under the decree are in conflict with each other, the rights under the later decree should prevail.¹

*Mahomed v.
Ram Bharos.*

The property in dispute was sold to a third person by its owner subject to two mortgages. The

1. *Appia Rukmini Ammal v. Kattuvowm Narasimha Iyer*, (1921) 41 M.L.J. 54=63 I.C. 730.

*Timmappa v.
Lakshmanna.*

vendee did not pay anything. The prior mortgagee sued on his mortgage impleading the puisne mortgagee and the purchaser from the mortgagor. The suit was decreed and the mortgagee himself purchased the property in execution and paid the surplus sale proceeds into Court in 1920. The puisne mortgagee had obtained a decree on his mortgage in 1914 but had allowed execution of it to become barred. A dispute arose between the puisne mortgagee and the vendee from the mortgagor as to who was entitled to the money in court deposit. It was held that the rights of the puisne mortgagee had merged in his decree, that his remedy was to execute the decree, that having allowed the decree to become barred it could not be said he had any interest in the property and that the puisne mortgagee was not entitled to be paid the money.¹

Redemption
and
contribution.

The purchaser of a portion of mortgaged property cannot seek to redeem that portion without redeeming the whole.² When there is a money decree and a mortgage-decree against the same person and in execution of the former part of the mortgaged property was brought to sale and purchaser of the holder of the money-decree, he was not entitled to insist on redeeming his share by paying a proportionate amount of the debt due to the mortgage who has the right to realise his debt from the whole or any portion of the mortgaged property.³

1. *Mahomed Abdul Rahim Khan v. Ram Bharos Ojha*, (1925) 22 A.L.J 825=83 I.C. 1033.

2. *Timmappa v. Lakshmanna*, (1882) 5 Mad. 385.

3. *Kuppusami Chetti v. Papathi Ammal*, (1897) 21 Mad. 369
See *Krishna Ayyar v. Muthukumarasawmiya*, (1905) 29 Mad. 217
explained in *Kommineri Appayya v. Mangala Rangayya*, (1908) 31 Mad. 419 F.B.

Where the plaintiff purchased certain properties at two sales in execution of two mortgage decrees obtained by him and the defendant purchased a portion of the same properties before either of the sales at which the plaintiff purchased, and before the date of the plaintiff's second decree, and the defendant was not a party to the plaintiff's two suits, nor was the plaintiff a party to the defendant's suit, it was held that (a) the defendant purchased the equity of redemption in the property covered by his decree; (b) the plaintiff purchased the mortgagee's rights and the equity of redemption in the remainder of the property not covered by the defendant's decree; (c) the defendant was entitled to redeem the plaintiff by paying off the proportionate amount of the plaintiff's mortgages due on the property purchased by him; (d) if the defendant failed to pay as aforesaid, the plaintiff would be entitled to pay him off by paying into Court the amount paid by the defendant for the property.¹

Redemption
and Contribu-
tion.

Five Survey Nos. 68, 71, 75, 76 and 77 were mortgaged by the plaintiff's predecessors to the defendant's predecessors in 1873. The interest was payable every year. The mortgagee obtained a decree for Rs. 500 in 1876 against the mortgagor on account of arrears of interest. In execution of the decree, Survey Nos. 68 and 75 were put up for sale and purchased by the mortgagee in 1877. About the same time Survey Nos. 71, 76 and 77 were put up for sale and purchased by B who obtained possession. In 1879 B sold the Survey Nos. to the mortgagee, who remained in possession

1. *Sheo Pershad Singh v. Babu Tilak Singh*, (1901) 5 C.W.N. 232.

Redemption
and contribu-
tion.

of all the Survey Numbers ever since. In 1907, the plaintiffs filed a suit to redeem the five Survey Numbers; It was held (1) that, as regards Survey Numbers 68 and 75, the only remedy which the plaintiffs had was in the first instance to get the sale set aside under proceedings taken in execution under s. 244, C. P. Code, 1882; and that, having failed to do so, they could not maintain their suit for redemption, because the sale was not void but only voidable.; (2) that, as to Survey Nos. 71, 76 and 77, they passed into the possession of a stranger to the decree, whose sale was confirmed and who obtained possession and enjoyed it for two years; and (3) that the mortgagee who subsequently purchased from him was entitled to rely on the title of his vendor.¹

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase, has, in the absence of fraud, the right of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, namely, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the property comprised in the mortgage.²

1. *Sahadu Manaji Shinde v. Devlya Jaba Mahar*, (1912) 14 Bom. L.R. 254=14 I. C. 780.

2. *Bisheshur v. Ram Sarup*, (1900) 22 All. 284 F.B. [modifying the judgment in *Chunna Lal v. Ananda Lal*, (1897) 19 All. 196; *Nand Kishore v. Raja Hari Raj Singh*, (1897) 20 All. 23 F.B.] *Fakirayya v. Gadigaya*, (1901) 26 Bom. 88; *Harendra Kumar v. Dindyal*, (1906) 4 C. L. J. 195; *Shib Lal v. Bhawani Shanker*, (1904) 26 All. 72; *Jugul Kishore v. Harbans*, (1906) 28 All. 700. See also *Raghunath v. Balaji*, (1889) 13 Bom. 45; *Lakshmidas v. Jamnadas*, (1898) 22 Bom. 304 F.B.; *The Hon'ble Raja Mohammad Khan v. The Deputy Commissioner of Bara Banks*, (1906) 9 O.C. 259.

When certain properties along with others are subject to two mortgages in favour of the same person, and the mortgagee has purchased and taken possession of such properties at a sale in execution of his decree on the first mortgage, such properties are liable to contribute rateably to the debt secured by the second mortgage, after deducting from the value of each the amount of the prior encumbrance to which it was subject at the date of the mortgage.¹

Redemption
and contribu-
tion.

So a purchaser of certain properties upon which there were two mortgages, being liable to contribute proportionately to the payment of both, could not, as beneficial assignee of the mortgages, foreclose the first mortgage and then sue the debtor mortgagor for the whole debt due upon the second, as though that debt were not a charge upon the mortgaged property at all and he himself were not liable for his portion of it.² When three persons were equally entitled to the equity of redemption in certain mortgaged property and the mortgagee purchased the share of one of them, the mortgagee was entitled, in a suit to realise the mortgage-debt, to give credit only for what his vendor would have been liable to pay, namely, one third of the mortgage debt.³ In *Amir Chand v. Bukshi Sheo Pershad*,⁴ it was held that any question of contribution arising by reason of the purchase by the decree-holder of some of the mortgage properties must be worked out by a regular suit and not in execution proceedings.

1. *Mahomed v. Thomas*, (1906) 4 C.L.J. 317.

2. *Kali Prosonno v. Kamini Sunduri*, (1879) 4 Cal. 475.

3. *Muthy Lall v. Nanda Lall*, (1908) 8 C.L.J. 92.

4. (1906) 34 Cal. 13, doubting *Mahomed v. Thomas*, (1906) 4 C.L.J. 317.

Sum payable
for redemp-
tion.

In *Het Ram v. Shadi Ram*,¹ it was held that on a true construction of section 89 of the Transfer of Property Act, on the making of an order absolute for sale the security as well as the right to redeem were both extinguished and the right of the mortgagee under his security there was substituted the right to a sale conferred by the decree; so that when a puisne mortgagee who was not impleaded in a suit on a prior mortgage brought a suit on his own mortgage, he was bound to pay not the amount of the prior mortgage as if no decree had been passed on it, but only the amount due on the decree.² In the corresponding provision of the C. P. Code, 1908, (Order 34 rules 3 and 5) the words "and thereafter the defendant's right to redeem and the security shall both be extinguished" are not reproduced. The result of the change was stated by the Privy Council³ to be this: "The law remains as it certainly was before the Transfer of Property Act of 1882 *viz.*, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded to set up the first mortgagee as a shield. On this view, it was held that "when a person insists upon the right to redeem on the ground that he was not made a party to and therefore not bound by the decree for the mortgage suit,⁴ he can be allowed to redeem only

1. (1908) 40 All. 407 P. C.

2. *Matru Lal v. Durga Kunwar*, (1919) 42 All. 364 P. C. explained in *Hukum Singh v. Lallanji*, (1920) 43 All. 204 F.B.

3. *Sukhi v. Ghulam Safdar*, (1921) 43 All. 469 (475) P. C.

4. *Jnanendranath v. Shorashi Charan*, (1922) 49 Cal. 629; *Umes Chandra v. Zahur Fatima*, (1890) 18 Cal. 164 P. C.

on the terms of the mortgage and on payment of interest at the rate payable under the mortgage up to the date of redemption to be fixed in the case.” A purchaser at the sale of the second mortgagee is bound to pay the purchaser at the sale of the first mortgagee, as the price of redemption, not merely what the latter had paid at the execution sale, but what was due upon the first mortgage.¹ If the purchaser at the sale of the first mortgagee has been in actual possession for any period, he must, as against the interest, either bring into account any profits he has recovered or be disallowed interest during that period.²

Sum payable
for redemp-
tion.

Where the prior mortgagee purchased the property mortgaged to him in a suit in which the puisne mortgagee was not made a party and the latter also purchased the same property subsequently in a suit in which the prior mortgagee was not made a party, it was held that each party would be entitled to redeem the other; but the preferable right to redeem was with the puisne mortgagee. The puisne mortgagee is bound to pay the mortgage money with interest at the rate specified in the mortgage to the prior mortgagee and any amount paid by the prior mortgagee in possession for the protection of the property or for redeeming any prior mortgage with interest as also the costs of the suit and appeal as in an ordinary redemption suit. An account was to be taken of the amounts realised

1. *Girish Chunder v. Kedarnath*, (1906) 33 Cal.598; *Nilakunt Banerji v. Suresh Chandra*, (1886) 12 Cal. 414 P.C.; *Gangadas v. Jogendra*, (1907) 5 C.L.J. 315=11 C.W.N. 403; *Ponnambala v. Muthusami*, (1912) 23 M.L.J. 284; *Awatmal v. Gokal Singh*, (1913) 6 S.L.R. 227.

2. *Ibid*. See also *Gurdeo Singh v. Chandrikah Singh*, (1907) 36 Cal. 193.

from the property by the prior mortgagee as mortgagee in possession from the date of the possession taken by him (prior mortgagee). If on taking accounts any balance be found in favour of the puisne mortgagee, the prior mortgagee will be bound to pay the said amount to him ; but if otherwise, then the usual decree to redemption suit will be passed.¹

Sale subject to mortgage or not,

If a person purchases an estate subject to a mortgage whether at a private sale or on execution sale or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made the purchase.² When however the purchaser merely buys an estate which is under mortgage but does not take it, subject to an encumbrance or undertake to discharge it, he is not precluded from impeaching the validity of the mortgage or any term of it.³ The question is whether the property was sold subject to the mortgage or whether mere notice of the mortgage has been given in the proclamation of sale. The former contingency is provided for by Order 21 rule 62 and the latter by Order 21 rule 66 C. P. Code.⁴

1. *Kedar Prosanna Lahiri v. Girindra Prosad Sukul*, (1910) 8 C.L.J. 173.

2. *Krishna Kumar v. Joy Krishna*, (1915) 21 C.W.N. 401=29 I.C. 690; *Mt. Karman v. Choltra Ram*, (1919) 50 I.C. 909; *Mahabir v. Anjamanisa*, (1919) 6 O.L.J. 61=50 I.C. 45; *Po So v. Ba Zan*, (1919) 12 Bur. L.T. 43=51 I.C. 580; *Gurucharan v. Bachni*, (1915) 2 O.L.J. 225=30 I.C. 238; *Pandurang v. Narayan*, (1923) 6 N.L.J. 78=76 I.C. 615; *Nursingh v. Raghoobair*, (1884) 10 Cal. 609; *Basawan Singh v. Gangaphal*, (1918) 47 I.C. 224; *Maung Lon Gyi v. Rahaman*, (1911) 14 Bur. L.T. 142=12 I.C. 855.

3. *Bhagwan Das v. Ahmad Jan*, (1916) 3 O.L.J. 422=36 I.C. 732; *Shib Kunwar v. Shco Prasad*, (1906) 28 All. 408; *Sri Chand v. Niadar Singh*, (1911) 8 A.L.J. 407=10 I.C. 14; *Narayan v. Umbar*, (1910) 13 Bom. L.R. 307=

4. *Kalidas v. Prasanna Kumar*, (1920) 47 Cal. 446; *Ram Kumar Dwarka Prasad*, (1912) 15 O.C. 211=15 I.C. 5.

Where an objection is allowed and the attached property is directed to be sold subject to the mortgage of the objector, the decree-holder by merely becoming the auction-purchaser of the property cannot challenge the mortgage in a subsequent foreclosure suit by the mortgagee against the decree-holder auction-purchaser.¹

Sale subject to mortgage or not.

Under Order 21, rule 66 C. P. Code, if a mortgage deed is merely notified, that notification is in no way conclusive as between the decree-holder or the purchaser on the one hand and the holder of the incumbrance on the other as to its validity, and where a sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale, the auction-purchaser is not estopped from questioning the validity of the mortgage.² If the mortgage notified turns out to be invalid the benefit is taken by the purchaser and the judgment-debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage. The purchaser is free to contest the legality or validity of the mortgage when he is attacked by the mortgagee,³ for the result of the proceedings which culminate in a sale proclamation under Order 21 rule 46 is not conclusive between the parties or binding on the auction purchaser.⁴

1. *Govinda v. Dheklur*, (1923) Nag. 282.

2. *Ganesh v. Bisram*, (1913) 18 I. C. 461; *Roshan Lal v. Lallu*, (1922) 44 All. 714; *Kishan Lal v. Rupram*, (1920) 2 U.P.L.R. 94=55 I.C. 354; *Rahas Behari v. Bachchu*, (1914) 1 O.L.J. 50=23 I.C. 871; *Bhagwan Das v. Ahmad Jan*, (1916) 3 O.L.J. 422=36 I.C. 732; *Sultankhan v. Mahabat*, (1921) 43 All. 489; *Izatunissa v. Partab Singh*, (1909) 31 All. 583. See *Mahomud v. Kishan Narain*, (1926) 48 All. 260.

3. *Mitsui Bussan Kaisha Ltd. v. Padamraj*, (1923) Nag. 219; *Krishna Kishor v. Nagendra Bala*, (1921) 34 C. L. J. 333=66 I. C. 694; *Ganesh v. Purushottam*, (1909) 33 Bom. 311; *Bhagwan Das v. Ahman Jun*, (1916) 3 O. L. J. 422=36 I. C. 732.

4. *Agha Sultan v. Mahabat Khan*, (1921) 63 I. C. 395.

A purchaser of property subject to a mortgage the mortgagee of which allows his right to be lost by lapse of time is not debarred from raising the plea of limitation.¹

Where a decree-holder brings properties of the judgment-debtor to sale in execution of his decree without disclosing the existence of a prior mortgage in his own favour, he is estopped from setting up the mortgage thereafter as against the auction-purchaser. The fact that the mortgagee is a minor makes no difference.²

An auction-purchaser in execution of a money decree derives his title from the judgment-debtor and not from the decree-holder. He purchases only the interest of the judgment-debtor and not any right which the creditor might have to set aside or question the validity of any deed which had been previously made by the judgment-debtor himself.³

In *Izzat-un-nissa v. Partab*,⁴ certain villages were put up for sale in execution of a decree under section 88 of the Transfer of Property Act (IV of 1882), and it was notified in the proclamation of sale that the property was to be sold subject to two prior mortgages of 25th May, and 2nd December 1877. The decree-holder (the predecessor in title of defendants) obtained leave to bid and became the purchaser of eight of the villages. Subsequently, as

1. *Dy. Commissioner of Lucknow v. Sukhnandan*, (1914) 17 O. C. 38=23 I. C. 448.

2. *Maung Kyin Pein v. Ma Pwa Me*, (1921) 64 I. C. 953. *Srimati Girbala Debia v. Srimati Rani Minakumari*, (1900) 5 C.W.N. 497; *Kasturi v. Venkatchalapati*, (1892) 15 Mad. 412.

3. *Narainrao v. Fathelal*, (1918) 15 N. L. R. 48=43 I. C. 905.

4. (1909) 31 All. 583 P.C.

the result of suits to enforce them, the two mortgages of 1877 were, by decrees of the Privy Council and the High Court respectively, declared to be invalid. In a suit brought by the vendor against the representatives of the auction-purchaser to recover the amount due on the two mortgages of 1877, as "unpaid vendors' purchase money"; it was held (reversing the decision of the High Court) that the suit was not maintainable, and it was said "On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain, or determined by public competition together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be expressed or implied. If the purchaser covenants with the vendor to pay the encumbrances it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burden attached to it. If the encumbrances turn out to be invalid the vendor has nothing to complain of: he has got what he bargained for: his indemnity is complete. He cannot pick up the burden of which the land is relieved and seize it as his own property. The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence of encumbrances or supposed encumbrances has led to a diminution of the price, and liable therefore to account to the vendor for anything that remains of that amount after the encumbrances are satisfied or disposed of, is without foundation. After the purchase is completed the vendor has no claim to

participate in any benefit which the purchaser may derive from his purchase." ¹

Merger and
foreclosure.

The purchase at an execution-sale of properties subject to encumbrances can legally take assignment of the mortgages bonafide in the name of a trustee for the purpose of preventing a merger of the mortgagor's and mortgagee's interests in the property.² A purchaser of the mortgagor's interest, whether he is in possession or not, is entitled to notice of foreclosure except where any alienation of such interest has been prohibited by contract between the mortgagor and mortgagee,³ but notice may be waived.⁴

Subrogation.

When a property is sold for the purpose of satisfying a lien or charge, and after sale is made and the price is paid, the sale is avoided, the owner of the property will not only retain the property, but will have its value enhanced by the amount paid towards the removal of the lien or charge. It is natural equity that the owner ought not keep the property with the profit and that the purchaser who has lost ought to be subrogated to the rights of the holder of the lien or charge.⁵ Sometimes formerly this equity was denied and it was said "It is only in cases when the person paying the debt stands in

1. See also *Tweddel v. Tweddel*, (1787) 2 Br. C. C. 151; *Butler v. Butler*, (1800) 5 Vis. 534; *Waring v. Ward*, (1802) 7 Ves. 332.

2. *Kaliprasanna v. Karmini Soonduri*, (1879) 4 Cal. 475.

3. *Achumbit v. Lullanund*, (1869) 11 W. R. 544; *Bhanoo-murthy v. Premchand*, (1875) 23 W. R. 96; *Rameswar v. Mewar Jugjut*, (1885) 11 Cal. 341; *Mulraj v. Sobha Ram*, (1883) P. R. 31; *Ganpat Rao v. Ramchand*, (1889) 32 C. P. L. R. 90 (want of notice to Official Receiver).

4. *Mitterjeet v. Mookh Lal*, (1876) 25 W. R. 139; *Fatreh v. Sain Datta*, (1877) P. R. 77.

5. See Freeman on VOID JUDICIAL SALES, 184,

the situation of a surety, and is compelled to pay in order to protect his own interest or in virtue of a legal process, that equity substitutes him in place of the creditor, as a matter of course without any special agreement. A stranger paying the debt of another will not be subrogated to the creditor's right in the absence of an agreement to that effect; payment by such person absolutely extinguishes the debt and security,"¹ and because he voluntarily discharges the debts of another, he is styled a volunteer.² But this theory of 'volunteer' was given up by the same Court, when it perceived the apparent inequity: "The purchaser at an invalid sheriff's sale is not a volunteer. It is the right of a citizen to bid at the sheriff's sale and it is not for the debtor whose debt the purchase money pays to denominate him a volunteer or to deny his right to make the debt out of the property pledged for its payment. It cannot make any difference to the debtor who gets the property, provided it goes in the discharge of his debt; that is, where he pledges it to go and there is where equity declares it go."³

Apart from this explanation, the right to subrogation in such cases has everywhere been conceded by the Courts in America. In *Hudgin v. Hudgin*,⁴ lands of a decedent were sold by court at the instance of a creditor and the proceeds applied towards debts due by the estate. Subsequently, the sale was adjudged void. In an action for ejectment, the purchaser pleaded the payment of money and the Court of Appeal of Virginia directed a decree declaring the

1. 1 Leading Cases in Equity, 113.

2. *Richmond v. Marston*, 15 Ind. 136; *Chambers v. Jones*, 72 Ill. 279.

3. *Bodkin v. Merit*, 102 Ind. 293.

4. 6 Gratt, 320.

Subrogation. purchase-money, so paid on such void sale and the interest thereon, after deducting therefrom the rents and profits of the land while occupied by the purchaser or his grantee (exclusive of improvements made by them respectively) to be a charge on the land and providing that, unless the same should be paid by the plaintiffs in a reasonable time, the land he sold for the satisfaction thereof, on terms to be prescribed for the purpose. This case is decided upon the principles that the purchaser, whose money has paid the incumbrances upon the land, has the right to be substituted to the rights of the creditor whose debt he has paid and because equity will not permit such creditor or incumbrancer lawfully in possession to be disturbed therein until his debt or incumbrance is fully satisfied, it will not permit such purchaser, who has paid the incumbrance in good faith and is thereby subrogated to the rights of the creditor, to be dispossessed until he is reimbursed for the moneys so paid by him.¹ In *Valli's Heirs v. Fleming's Heirs*,² a similar view was taken and when the purchaser under a void sale paid off prior incumbrances, the court allowed the the defence that "notwithstanding the apparent and technical payment and extinguishment of such mortgage, equity would, under the circumstances, treat as still subsisting and unsatisfied, for the protection of the purchasers from the administrators or their grantees and would subrogate such purchasers or grantees to all of the rights of the mortgagee, treating them as assignees and purchasers of the mortgage, for a valuable consideration by them paid." This case was decided mainly on the authority of

1. Freeman on VOID JUDICIAL SALES, 197.

2. 29 Mo. 152.

Bright v. Boyd.¹ On an elaborate examination of Subrogation. the authorities Justice Story held that a purchaser was liable to be reimbursed for the value of improvements made by him before his sale was set aside.

Recent opinion in America has been in favour of recognising and enforcing the claim of purchasers at void sales by whose purchase moneys have been realised and when realised have been applied in payment of liens upon the property purchased or of claims which, though not secured by any specific lien, were enforceable against the assets of the estate and for the payment of which the lands in controversy might have been sold.² In equity, the claims thus paid must be regarded as still subsisting and the purchaser as being the assignee thereof, and as such "entitled to be subrogated to all the rights of the original holders of such debts according to their respective privities, in the same manner and to the same extent that the administrator would have if he had advanced and used his own money in the payment of the debts in question."³

Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt, which, in the event of default by the debtor, he would be bound to pay or when he had some interest to protect or when he advanced the money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor.⁴ It is borrowed from the Civil Law and is of two kinds,

1. 4 Story 478.

2. Freeman on VOID JUDICIAL SALES, 203.

3. *Derneau v. Garney*, 108 Ind. 579; *Stultz v. Brown*, 121 Ind. 370.

4. *Wilkins v. Gibson*, (1901) 113 Georgia 31.

Subrogation. legal and conventional.¹ Legal subrogation took place as of right² and without an agreement as such by the creditor and conventional subrogation was applied when an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor. These are two distinct classes of cases, where no bargain is made when the money is advanced and where the money is advanced on the understanding that the creditors should be subrogated to the position of the mortgagee³ and it is only in the first class of cases that the question of intention to keep the mortgage alive arises.⁴ Therefore where a person stands in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected, for instance, as a purchaser who extinguishes the encumbrances upon his estate, he would be subrogated to the rights and remedies of the original creditor.⁵

A mere payment of the decretal money under Section 310 A of Civil Procedure Code 1882 by a judgment-debtor or a person whose immoveable property has been sold cannot *per se* invest that person with the right of the decree-holder to whom that payment is made. But in a mortgage decree an auction-purchaser purchases the rights of the mortgagor as they existed on the date of the mortgage and the rights of the decree holder *qua* the

1. How's STUDIES IN THE CIVIL LAW, 256.

2. Such as is referred to in Transfer of Property Act (IV of 1882), sections 95-7.

3. See *Dinobundhu v. Jogmaya*, (1901) 29 Cal. 154 P.C.

4. *Gurdeo v. Chandrika*, (1907) 36 Cal. 193.

5. *Shinn v. Budd*, (1862) 14 N.J. Eq. 234; *Gurdeo v. Chandrika*, (1907) 36 Cal. 193.

property sold, as existing on the date of the sale.¹ Subrogation. Every defence open to the decree-holder as against the judgment-debtor and third parties, *qua* the property, is also open to the auction-purchaser ; and on the principle of equitable subrogation, a person interested in the discharge of a prior incumbrance, within the meaning of Section 91 of the Transfer of Property Act 1882, is entitled to discharge it and becomes thereupon entitled, unless the mortgage is extinguished by that payment, to all the remedies open to him when he had paid. "Where a payment is made by a tenant for life, the charge cannot be regarded as extinguished, but is kept alive for his benefit as against the inheritance and this quite independently of any expressed intention, it being presumed that as it is so manifestly for his benefit that the charge should not be extinguished, he intends that it should not be so."²

"No merger will be preserved of a charge paid off by one person of an estate defeasible under an executory devise, for such a person is not within the principle which affects tenants in tail, because he cannot of his own act make his estate indefeasible. Although therefore he is not like the tenant for life (because upon a contingent event his estate may become indefeasible) yet the same principle is applied to him which is applied to a tenant for life, and to whom, whether he be a simple tenant for life or tenant for life with remainder in fee to himself after contingent remainder and whether the estate be or be not inalienable, the rule is that by payment

1. See *Khevrāj v. Lingayya*, (1881) 5 Bom. 2 ; *Seshagiri v. Salvador*, (1881) 5 Bom. 5 ; *Magunlal v. Shukhar*, (1893) 22 Bom. 945.

2. Encyclopædia of Laws of England, IX.

Subrogation. of the charge he shall be presumed to be a creditor for the amount, because of the scantiness of his estate, even though he may have done no act to show such an intention ; for it will not be supposed that he would discharge a debt on another man's estate."¹

Where the purchaser of an equity of redemption pays off a prior mortgage, such mortgage is not extinguished ; the purchaser acquires an equitable right to its benefits which could be used against a subsequent mortgagee.² The question, whether a mortgagee who has become a purchaser of his security or keeps it alive, depends on the express or implied intention of the parties ; and when it is manifestly for the interest of the person in whom both the mortgage and the equity of redemption have united, to keep the security alive, an intention, so to keep it, will be presumed in the absence of circumstances negating such a presumption.³ So it has been held

1. Fisher's LAW OF MORTGAGE, 6th Edn., 725.

2. *Gokuldas v. Rambux*, (1884) 10 Cal. 1035 P. C.; *Sarbadhi Rai v. Raghunath Prasad*, (1886) 7 All. 568 ; *Surjiram v. Barhma-deo Persad*, (1905) 2 C.L.J. 202.

3. *Gaya Prasad v. Salik Prasad*, (1881) 3 All. 682 ; *Har Prasad v. Bhagwan Das*, (1882) 4 All. 196 ; *Muhammad v. Tekchand*, (1882) 2 A.W.N. 59 ; *Lachmi Narain v. Koteswar Nath*, (1880) 2 All. 826 ; *Ali Hasan v. Dhirja*, (1882) 4 All. 518 ; *Ram Kishen v. Dipa Upadhia*, (1891) 13 All. 581 ; *Shyam Lal v. Bashiruddin*, (1906) 28 All. 778 ; *Gangadhara v. Sivarama*, (1884) 8 Mad. 246 ; *Rupa Bai v. Adimulam*, (1888) 11 Mad. 345 ; *Seetharama v. Venkatakrishna*, (1893) 16 Mad. 94 ; *Alangaran v. Lachminarain*, (1895) 20 Mad. 274 ; *Koopmia Saheb v. Chidambaram Chetti*, (1896) 19 Mad. 105 ; *Vanmikalinga v. Chidambaram*, (1905) 29 Mad. 37 ; *Mohesh Lal v. Mohant Bawan Das*, (1883) 9 Cal. 961 F.B. ; *Bhiku v. Shajal Ali*, (1901) 29 Cal. 25 ; *Dinobandhu v. Jogmaya Dasi*, (1901) 29 Cal. 154 P. C. ; *Girdhar Das v. Ram Astar Singh*, (1904) 8 C.W.N. 690 ; *Ram Krishna v. Chothmal*, (1889) 13 Bom. 348 ; *Lomba Ganaji v. Vishvanath*, (1894) 18 Bom. 86 ; *Mulchand v. Kallu*, (1882) 6 Bom. 404 F.B. ; *Shantapa v. Balapa*, (1882) 6 Bom. 561 ; *Jamilunissa v.*

that the purchaser of an equity of redemption who had paid off the first charge might use the first mortgage as a shield against mesne incumbrances, the payment being made by a person, who is under no personal obligation to pay, only to protect his own interest,¹ and no possession can be ordered against him unless the amount paid by him is repaid.² That right is not affected by limitation.³ When a purchaser from a Hindu widow paid off an existing incumbrance and the reversioner succeeded in getting the purchase set aside, the Court held him liable to pay the mortgage amount and directed possession subject to its payment.⁴ The purchaser of an equity of redemption upon paying off prior mortgages is subrogated to the rights of the mortgagees paid off, the mortgages paid being considered part of the purchaser's title to the premises. Such a purchaser is entitled to claim interest on the foot of the mortgages discharged ;

Pitambar Das, (1913) 11 M.L.J. 127 ; *Radharam v. Ralaram*, (1904) P. R. 30 ; *Amarchandra v. Roy Goloke*, (1900) 4 C.W.N. 769 ; *Ramshan Ali v. Kali Mohan*, (1907) 4 C.L.J. 79 ; *Surjiram v. Barhmdeo*, (1905) 2 C.L.J. 288 ; *Baijnath v. Mahomed*, (1905) 2 C.L.J. 574 ; *Jagatdhar v. A. M. Brown*, (1906) 33 Cal. 1133. See also *Krishna v. Narayana*, (1884) 7 Mad. 127.

1. *Ramu Naikan v. Subbaraya*, (1872) 7 M.H.C.R. 229 ; *Gokul Das v. Rambux*, (1884) 10 Cal. 1025 P.C. ; *Mata Din v. Kazni Husain*, (1891) 13 All. 432 F.B. ; *Sohan Lal v. Jot Singh*, (1913) 20 I.C. 458 ; *Chamaswami v. Padala Anandu*, (1908) 31 Mad. 439. See also *Mahomed v. Shewrikram*, (1875) 2 I.A. 17 ; *Seetaram v. Lachman*, (1892) 12 C.P.L.R. 70 ; *Gur Parshad v. Sati Bindra-ban*, (1898) 3 O.C. 254 ; *Ramnath v. Brahmamoyi*, (1905) 2 C.L.J. 531 ; *Surjiram v. Barhmadeo*, (1905) 2 C.L.J. 202.

2. *Nilo v. Rama*, (1884) 9 Bom. 85 ; *Narayan v. Bapu*, (1892) 17 Bom. 741.

3. *Venkataramanareddi v. Rangiah Chetti*, (1921) 41 M.L.J. 399.

4. *Syed v. Shewak*, (1870) 14 W.R. 315 ; *Moulvie v. Shewak*, (1874) 22 W.R. 409 P.C. ; *Syed v. Hafiz*, (1872) 17 W.R. 480 ; *Rajhular v. Akhtar*, (1908) 5 A.L.J. 366.

Subrogation. but he cannot be allowed to retain the profits of the property, for it is only his character as mortgagee which can support his claim for interest and it is only the status of full owner that can justify the enjoyment of profits and he cannot claim simultaneously his right in both capacities.¹

Subrogation is by redemption and unless there is redemption, subrogation cannot take place.

Apart altogether from section 95 of the Transfer of Property Act, where B, a purchaser of certain property under a simple money decree, has redeemed the whole mortgaged property, he has a charge on the shares of the other mortgagors and having obtained a decree for sale of their property and having caused that property to be sold, the purchaser's claim has priority over that of an auction-purchaser at a sale in execution of a simple money decree, which sale was subsequent to B's decree though prior to B's sale.²

Where a puisne mortgagee sued for sale without impleading the prior mortgagee and obtained a decree, and in execution, a portion of the properties was purchased by A, and subsequently the prior mortgagee purchased the mortgaged property from the mortgagee in satisfaction of his debt and then filed a suit on his mortgage, it was held that the plaintiff's rights under his purchase were put an end to by the purchase of A at court sale either on the ground of the priority of the latter sale in point of time or by the doctrine of *lis pendens*, and that the plaintiff was therefore entitled to rely on his mortgage and enforce his right of sale thereunder; as a matter of equity, the plaintiff should first be directed

1. *Satnarain v. Chawdhuri*, (1911) 14 C.L.J. 500.

2. *Mahesh Dutt Pandey v. Tulsee Ram*, (1906) A.W.N. 178.

to proceed against the properties other than those Subrogation. included in the prior sale to A.¹

In *Venkat Reddy v. Kunjappa Goundan*,² the 5th defendant, a mortgagee of certain properties from the 1st defendant and the father of defendants 2 and 3, sued upon his mortgage and obtained a decree for sale. In execution of that decree all the mortgaged properties were sold and purchased by the plaintiff, being sufficient to discharge the mortgage debt. The 4th defendant was an auction-purchaser of one half of the mortgaged properties at a sale held, subsequent to the mortgage (in favour of the 5th defendant) but prior to the sale at which plaintiff became purchaser, in execution of a money decree obtained against the father of defendants 2 and 3. He (4th defendant) was not made a party to the suit by the 5th defendant, though the latter had notice of his (4th defendant's) rights. In a suit brought by the plaintiff against defendants 1 to 5 for the recovery from the 4th defendant of the mortgage debt and interest from the date of the mortgage up to the date of the plaintiff's sale together with future interest and for a sale of the properties in his possession in default of payment, it was held that the plaintiff, as the assignee in law of the original mortgagee's rights by virtue of his purchase in court sale, was entitled to institute a second suit for sale on the mortgage as against persons who were not parties to the prior suit, that the only right of the 4th defendant was to redeem the mortgage, that the amount payable by him as a condition of

1. *Enturi Guravayya v. Muppulaneni Butchayya*, (1912) 16 I.C. 779.

2. (1924) 47 Mad. 551.

Subrogation. redemption was the amount of the decree in execution of which the property was purchased by the plaintiff, and that the plaintiff was not entitled to future interest as he had been in possession of one half of the properties purchased by him and the whole difficulty arose out of the default to make the 4th defendant a party to the original mortgage suit. The effect of the omission in O. 34 R. 5 of the present C. P. Code, of the words "and thereupon" (on an order absolute being passed) "the defendant's rights to redeem and the security shall both be extinguished" is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage suit.

The person who makes the payment cannot by simply paying the interest as it accrues or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount due to an encumbrancer senior to his own and the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense.¹

In *Venkataramana reddy v. Rangiah Chetti*,² a prior mortgagee sued on his mortgage and obtained a decree for sale without being aware of, and therefore without impleading the puisne mortgagee as a party to the suit. In execution of the decree an item of the mortgaged property was sold and with the purchase money, a portion of the decree amount was paid off. The purchaser at the execu-

1. HARRIS ON SUBROGATION, s. 29; *Gurdeo v. Chandrikah*, (1903) 36 Cal. 193.

2. (1921) 41 M. L. J. 399.

tion sale in his turn mortgaged that item to the defendant to secure moneys already borrowed by him for the purpose of depositing the purchase money at the Court sale. The defendant obtained a decree on his own mortgage, executed it and purchased the rights of his own mortgagor in the item mortgaged to him. Subsequently in a suit by the puisne mortgagee to enforce his mortgage the defendant pleaded that he was entitled to a prior charge on the item sold in execution of the decree on the first mortgage to the extent to which that decree was satisfied. It was held (1) that the purchaser at the execution sale having released the item purchased by him from all liability under the decree on the prior mortgage was entitled to a prior charge on that item in respect of the moneys paid by him towards the decree on the prior mortgage; (2) that notwithstanding the fact that the prior mortgagee had a decree on his mortgage and sold the property in execution thereof, it was open to the purchaser to hold his right to the prior charge as a shield against the puisne mortgage in the suit by the latter to enforce his mortgage; (3) that the right of the defendant to hold the prior charge as a shield was not affected by limitation; (4) that the purchaser had not a general right of subrogation by reason of the fact that he had paid off a portion of the decree on the prior mortgagee; but (5) that the defendant being a mortgagee from the purchaser was entitled to avail himself of all the rights which his own mortgagor had in that particular item of the mortgaged property which was freed from all liability by

Subrogation.

Muthammal v. Rasu Pillai, (1917) 41 Mad. 513; see *Chagan Lal v. Muhammad Hussain Khan*, (1919) 41 All. 455; *Matru Lal v. Durga Kunwar*, (1920) 42 All. 364.

Subrogation. the purchaser including the right of priority as aforesaid.¹

In granting relief by subrogation the principle to be observed is that whoever seeks equity must come with clean hands. Whenever therefore the relief was afforded in equity, the courts have proceeded on the express ground that the purchaser had acted in good faith and in ignorance of the irregularity of his title was impaired. If therefore a purchaser is guilty of fraud, on account of which his purchase is adjudged void, he cannot "reclaim his purchase money and he forfeits it to those whom he sought to defraud, for they may retain the money and recover the estate".² But that good faith means no more than an honest belief in the rectitude of his purchase. "It is true", says Freeman "that in many of the decisions,³ affirming the right to subrogation the purchaser in whose favour it was affirmed was spoken of as having acted in good faith and sometimes as being ignorant of the defect on account of which his title was found to be invalid. When there is actual fraud on the part of the purchaser he may doubtless be denied relief, as already suggested, on the ground that he does not come to equity with clean hands, but if, as some of the decisions indicate, the right to subrogation depends on the ignorance of the purchaser, then there is introduced in such cases a new and strange issue involving the mental capacity or the oppor-

1. *Hanumanthayya v. Meenatchi Naidu*, (1911) 35 Mad. 183; *Bisnath Karunani v. Devi Dass*, (1915) 29 I. C. 511.

2. *Mc Caskey v. Graff*, 23 St. 321; *Elam v. Donald*, 58 Tex. 816.

3. See *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; *Blodgett v. Hitt*, 29 Wis. 182; *Hudgin v. Hudgin*, 6 Gratt. 320; *Bright v. Boyd*, 1 Story 478.

tunities for information possessed by the purchaser. Subrogation. The whole doctrine may be rendered practically inoperative on the ground that each person is chargeable with knowledge of the law and notice of the proceedings under which he claims title and therefore may be deprived relief on the ground that he was actually or constructively informed both of the law and the facts and hence not entitled to the interposition of equity".¹ In many of the cases that have come before courts facts rendering the sale void might have been discovered by an attentive examination of the proceedings in the sale and of course there is no denying the existence of the general presumption that everyone knows the law. Subrogation, says Freeman, cannot be denied to a purchaser on the ground of his familiarity, actual or presumed, with either the facts or the law, unless it further appears that his action has been induced by fraud or apparent intention to recklessly disregard or subvert the rights of others.²

In Mississippi, a fraudulent purchaser may assert the same equities as one who has acted in good faith and is entitled to subrogation.³

In *Syamalarayudu v. Subbarayudu*,⁴ A having mortgaged land to B agreed to sell it to C and then to D, in whose favour he executed a conveyance bearing a date prior to the contract with C. C sued A and B to have the conveyance set aside and got a decree for specific performance. While the suit was pending, D paid off B and he sued A and C to recover the money when his title on the

1. See *Grant v. Lloyd*, 112 S. & M. 191.

2. VOID JUDICIAL SALES, Ss. 207-209.

3. *Grant v. Lloyd*, 12 S. & M. 191.

4. (1897) 21 Mad. 143. See also *Parvati v. Venkatarama*, (1925) Mad. 80.

Subrogation. conveyance failed. It was held that the plaintiff occupied the position of the mortgagee whom he had paid off and that the sum constituted a charge on the land. It was said "The ground given in the courts for refusing to allow the plaintiff's payment to be a charge on the property was that the payment was not *bona fide* and that it was not *bona fide* because it was made during the pendency of the suit between the plaintiff and the 2nd defendant about the sale. We fail to see in this circumstance anything to affect the validity of the payment which was no doubt made by the plaintiff for the purpose of strengthening his own claim. The plaintiff's illegal act in antedating his sale deed also for the purpose of supporting his title does not vitiate the payment subsequently made and which in itself was legal. There was therefore no want of *bona fides* and entirely no fraud."

Reversal of
decree.

Where the decree or order under which execution took place and sale was held is set aside by the same Court or on appeal, the sale cannot stand if the purchaser is a party to the suit, but if the purchaser is a stranger his purchase is unaffected by such reversal.¹

"The protection which the law extends to purchasers at execution and judicial sales, whereby they are shielded from secret frauds and irregularities, rests upon public policy. This public policy demands that there should be such confidence in the proceedings of the courts and of their officers, that persons acting in good faith shall not be afraid to invest their capital in the purchase of property ex-

1. See page 571 *supra*; *Ramachandra v. Lakshman*, (1926) Nag. 298=92 I.C. 803.

posed to the hazard of sacrifice at compulsory sales, when the proceedings have the appearance of regularity. But public policy never requires that any man shall be secured the fruits of his own fraud, nor even the fruits of a fraud perpetrated by others, and brought within his knowledge at the time he made his investment. On the contrary, a sound public policy requires that every species of fraud shall be discouraged and punished. When, by any fraudulent contrivance, the purchaser at an execution sale has obtained an unconscionable advantage, equity will, beyond question, compel him to relinquish it. And perhaps the aid of equity need not be invoked. For the reported cases generally agree in affirming that a title acquired by execution sale, through the aid of false representations, or of any trick, device, imposture, or other fraud on the defendant in execution, is, while held by the guilty purchaser, utterly worthless and void. And in order to be purged of the vices by which it was infected by the misconduct of the original purchaser, it is essential that the title should be transferred in good faith, and upon a valuable consideration, to some person who is both guiltless and ignorant of those vices; for a purchaser with notice has no higher equity, and will receive no further protection, that a participant in the fraud. If, on the other hand, there were fraudulent devices or tricks resorted to of which the purchaser had no notice, they cannot operate to impair his title. Having a perfect title, he may transfer a like title to any one else. Hence, it cannot be destroyed in the hands of his vendee by showing that the latter had notice of or even concurred in such tricks or devices.”¹

Reversal of
decree.

1. Freeman on EXECUTIONS, III, 1961.

Reversal of
decree.

“ Upon the reversal of a judgment after a sale has been made under execution to a stranger to the suit, the defendant must seek redress from the plaintiff. This redress was formerly obtained by a *scire faciasquare restitutionem non*. This is still the remedy in some states in cases where the record does not show that the money realized from the sale has been paid to the plaintiff. Where the plaintiff has received the proceeds of the sale, the defendant may recover in an action for money had and received. If, however, the money, after being paid to plaintiff, is by him paid to a third person, it cannot be recovered from such person, though he was one of the plaintiff's attorneys. The right to recover of the plaintiff is perfect upon the reversal of the judgment. It then becomes his duty to restore everything of value taken under such judgment, without waiting for any demand on him therefor. Hence, in an action for the continued holding of the property, no demand need be alleged or proved. A question of importance in connection with this subject is, whether the plaintiff must account to the defendant for the real value of the property sold, or for the sum which it brought at the sale. In California, it has been assumed that an action may be sustained to recover the damages suffered from the sale. In other states, the plaintiff may exonerate himself by paying the amount for which the property sold, with interest from the date of the sale. In two of the cases cited as sustaining a recovery for the actual damages suffered by the sale, it had been made to the plaintiff, and the defendant, instead of seeking to recover the property, had elected to maintain an action for the damages accruing to him from the sale, and it may

be that the measure of damages differs in actions of this character from those in which it appears that the property has been sold to a stranger to the suit, for, as when the property has been sold to the plaintiff, the defendant, after reversal, may sue for and recover it in specie, there seems to be no special hardship in permitting him to recover the damages resulting from the sale, if he elects to affirm it, because these damages must ordinarily be the value of the property, with, perhaps, interest added, from the date of the sale.¹

Reversal of
decree.

“The judgment may be reversed in part only, as where the amount of a mortgage foreclosure is reduced upon appeal. In such case it has been held that, because all ground for the sale was not destroyed, it would be permitted to stand, although the plaintiff was the purchaser, unless “it should be shown that there was some unfairness in the sale, or that the property would, on a resale, bring a larger amount than the bid at the first sale.” Probably the mere showing that the property would bring a greater sum on a resale does not entitle the appellant to the vacating of the sale, and his sole remedy is to maintain an action for any sum collected by the respondents in excess of that found due by the appellate court. Where a judgment directs a sale of specific property, and is on appeal reversed as to such direction, but the right of a respondent to a money judgment is sustained, it has been held that his title is destroyed by the reversal.

“Can a plaintiff purchasing at a sale under his own judgment, and, therefore, subject to the loss of his title by its reversal, transfer to another a title free from this hazard? There are, indeed, several

1. FREEMAN ON EXECUTIONS, III. 1976.

Reversal of
decree.

decisions apparently putting one purchasing from the plaintiff under such circumstances, especially before an appeal has been taken or a writ of error sued out, on the same footing as if he had himself been the purchaser at the original sale, but surely all persons are chargeable with notice of the law, and, hence, of the times within which appeals may be perfected or writs of error prosecuted, and that the title held by the plaintiff is subject to destruction by the reversal of the judgment upon which it rests. Public policy does not require that third persons shall purchase his title, or, if they do so, that they shall acquire it free from the risks upon which he held it, and we believe the better opinion is, that any purchaser from the plaintiff necessarily receives the title subject to the conditions under which it was held by him.¹

Improve-
ments.

The right of a purchaser under a void judicial sale for value of improvements effected by him to the property during the period of his possession has been considered and allowed.

In the case of a private sale the Transfer of Property Act enacts "when the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement. The amount to be paid or secured in respect of such

1. Freeman on EXECUTIONS, III. 1982.

improvement shall be the estimated value thereof at the time of eviction."¹ The principle embodied in this rule, obviously based on the grounds of justice and equity, is "that no man should be allowed to enrich himself unjustly at the expense of another and that consequently when the defendant has made the improvements in good faith as a *bona fide* occupant of the land and on the belief that the land is his own, the plaintiff who obtains the benefit of the expenditure which has increased the value of the property ought to reimburse the defendant for the expenditure so made"² or stated otherwise, "A bonafide purchaser for a valuable consideration, without notice of any defect in his title, who makes improvements and no alienations upon the estate has a lien or charge thereupon for the increased value which is thereby given to the estate beyond its value without them and a court of equity will enforce the lien or charge against the true owner, who recovers the estate in a suit at law against the purchaser."³

Improve-
ments.

This rule of equity that he who seeks equity must do equity is embodied in the Specific Relief Act, which provides that "On adjudicating the cancellation of an instrument, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require"; and "Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be returned to substantially the same position as if the contract

1. Act IV of 1882, S. 51.

2. *Per* Story J. in *Bright v. Boyd*, (1841-43) 1 Story, 478; Freeman on Void JUDICIAL SALES, 201; American Encyclopedia of Law and Procedure, XXIV, 70.

3. Act I of 1877, S. 41.

Improve-
ments.

has not been made;”¹ and “on adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.”²

In *Musadee v. Meerja*,³ the Privy Council said that when a deed was good at law but void in equity, there might have been an account of the profits and of those sums that had been laid out in improvements. Their Lordships referred to and distinguished the case of *Hamblyn v. Ley*,⁴ where a voluntary deed was executed for the purpose of defeating a sequestration, and Lord Hardwick set aside that deed, and made an allowance to the parties for what had been expended, both in the payment of interest on the mortgage and for taxes and repairs.

In *E. C. Morgan v. Moulvie Abdul Hye*,⁵ the purchaser at a court sale took possession of the property from a receiver, under order of court, even before confirmation and laid out money for the benefit of the estate and when the sale was subsequently reversed, the court said “It is beyond question that the purchaser *bona fide* took possession of the property and from time to time laid out money thereon, because he thought that otherwise from its peculiar nature it would become worse than valueless. The property was at the time when he took possession in the hands of a court manager appointed under S. 299 of the C. P. Code of 1859, who delivered it to him apparently under the direc-

1. Ibid. S. 36.

2. Ibid. S. 38. See also the Indian Contract Act (IX of 1872), Ss. 64-65.

3. (1854) 6 M. L. A. 27 (51).

4. 3 Swan 301 note.

5. (1875) 23 W. R. 393.

tions of the court. If he or the manager has not spent money in carrying on the indigo concern very quickly and from the date of the sale, the opportunity of the season would have been lost, and the property very greatly deteriorated; and if he had not paid the rents of the leasehold parts of the property, when, and as they became due, the lease might have been forfeited. We think therefore on the whole that the taking possession and the outlay was so far justifiable on the part of the purchaser that he is entitled to have it made a condition of setting aside the sale, that he be repaid so much of the outlay as he can show was beneficial to the estate. On the other hand, he must account for the rents and profits which have come to his hands during the time he has been in possession. The Civil Procedure Code does not anywhere in express terms authorise the court, when setting aside a sale under Section 256 (now O. 21, r. 90) to impose conditions such as these, but we think, that, if this power to set aside a sale extends to a case when the purchaser has been let into possession before the sale is confirmed (and there seems no doubt that it does so) then authority to this effect must be implied; otherwise the setting aside of the sale, would in many cases work a greater injustice than it remedies." Their Lordships made it a condition that repayment of the purchase money, interest and the money so laid out was to be a condition precedent to setting aside the sale.

Improvements.

In *Moitheen v. Apsa Bivi*,¹ the plaintiff was the purchaser at a court-sale, in execution of a mortgage decree, of a house and the sale was set aside on the ground that a minor defendant in the

1. (1911) 36 Mad. 194.

Improve-
ments.

mortgage suit was not properly represented in the sale-proceedings. The property was redelivered in restitution and the plaintiff claimed therefore on eviction the value of improvements made by him in the interval. Their Lordships referred to the opinion of the Judicial Committee¹ on the fate of purchases made under decrees, subsequently reversed, on the distinction between purchases made by the decree-holders who purchased under their own decrees and those made by *bona fide* purchasers who were no parties to the decree and said that possibly the Judicial Committee meant no more than that purchasers who were no parties to the decree were *bona fide* purchasers as opposed to those who were parties to the decree. They concluded that to entitle a purchaser to cost of improvements, he need show no more good faith, than an honest belief in the validity of his title.²

If, as their Lordships hold, the principle is that no man ought to have the benefit of expenditure without an obligation to reimburse the losing party and that for such a relief no good faith is needed beyond a sincere belief in the validity of his title, there is no reason why such a relief should be refused to a decree-holder, who might himself happen to the unlucky purchaser, subsequently evicted. It is not impossible to imagine cases where sales may be adjudged void or set aside on reversal of decrees, without an imputation of dishonesty on the part of the decree-holder in the conduct of the proceedings leading to the sale in execution. A sale

1. *Zainulabdin v. Muhammad Asghar*, (1888) 10 All. 166 P.C.

2. See also *Narayana v. Sankaranarayana*, (1914) 24 I.C. 940; *Shahabuddin v. Vohidbux*, (1920) 56 I.C. 492; *Narayan v. Beharilal*, (1926) 89 I.C. 18.

may, for instance, be quashed for want of territorial jurisdiction, or owing to the setting aside of an *exparte* decree. Either, as their Lordships observed, good faith is out of consideration in the matter or the only good faith meant is a belief in the validity of the title; there is no reason why a decree-holder should be denied the same privilege, if he happens himself to be the purchaser, which under the same, if not worse conditions, a purchaser, if a stranger, would be granted. Improvements.

But in *Velusamy v. Bommachi*,¹ their Lordships denied the concession and said "we cannot accept the contention that a party to the litigation is entitled to receive compensation for the improvements made by him *pendente lite* with the full knowledge of the risk he runs in doing so. It cannot be held that he made the improvements *bona fide* when he was bound to be fully aware that the decree that he had obtained might be reversed on appeal. The rule laid down in *Moitheen v. Apsa Bivi*,² with regard to an auction-purchaser who is not a party to the suit being entitled to compensation for improvements made by him when he is subsequently ousted from possession on account of the sale being set aside is not applicable to a party to a litigation concerning immoveable property making improvements during the progress of the contest between the parties."

In *Budhi Lal v. The Administrator-General of Madras*,³ in a suit by the first mortgagee to which the second mortgagee was not made a party, the property was sold and in a subsequent suit of the

1. (1913) 25 M.L.J. 324=21 I.C. 219

2. (1914) 36 Mad. 194

3. (1922) 44 All. 418.

Improve-
ments.

second mortgagee impleading the earlier mortgagee and auction-purchaser, the latter claimed the value of improvements made by him. In directing redemption, the Court refused to allow compensation for improvements.

Improvements¹ will include all ameliorations by making valuable additions and alterations which increase the value of the property or enhance its excellence. The value of the improvements should not be calculated upon their capitalised value or upon the basis of the return they are likely to fetch, but upon their fair market value at the time of the surrender. It must be estimated, that is calculated upon some intelligible basis, taking into consideration the actual cost as well as the trouble and labour expended.² The value of crops on the field may count in estimating the value.³ Spending small sums of money every year on in the usual manuring and levelling of the lands etc., does not entitle a person to recover the same as the value of improvements.⁴

Lis pendens.

Under the Transfer of Property Act (IV of 1882), Section 52, "During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit

1. For definition of improvements, see Act XIX of 1883, Act VIII of 1885, Act XVI of 1887, Act XI of 1893, Mad. Act I of 1900, Mad. Act I of 1908, and U.P. Act II of 1901.

2. See *In re Munji*, (1891) 15 Bom. 279; *Secretary of State v. Charlesworth*, (1902) 26 Bom I. P. C.; *Fink v. Secretary of State*, (1907) 34 Cal. 599; *Kidarnath v. Matarmal*, (1913) 40 Cal. 555 P.C.

3. *Deo Dat v. Ram Autar*, 1816 8 All. 502.

4. *Sudala Muthu Moopan v. Sankaranarayana*, (1914) 1 L.W. 379=24 I.C. 874

or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under the authority of the Court and on such terms as it may impose. "Reading this section along with section 2 (d) it would appear to be evident that *prima facie* the section does not extend to a transfer by operation of law or by or in execution of a decree or order of a court of competent jurisdiction. On the other hand if the doctrine applied to involuntary transfers, there can be no doubt but that an easy means would be within a party's power to circumvent the rule as by suffering to pass a consent or collusive decree and thus affect the desired transfer circuitously what he could not be permitted to do directly."¹

Lis pendens.

It was for some time thought that the doctrine of *lis pendens* did not extend to sales or deeds by Court;² but it is now settled law that involuntary transfers are not an exception to the rule and a purchase at a court sale will be affected by the disability equally.³

1. Gour's Transfer of Property, Vol. I. 522

2. See *Naffar v. Ramlal*, (1871) 15 W.R. 308; *Tarakchandra v. Baikantnath*, (1881) 7 Cal. 107; *Chunder Nath v. Nilakant*, (1882) 8 Cal. 690; *Lalu v. Kashibai*, (1886) 10 Bom. 400 (405); *Ali Shah v. Hussain Bakhsh*, (1878) 1 All. 588; *Anand Moyi v. Dhirendra*, (1871) 14 M.I.A. 101.

3. *Robind v. Wise* (1875) 23 W.R. 329; *Motilal v. Karabuldin*, (1896) 25 Cal. 179 P.C.=24 I.A. 170; *Har Shankar v. Sheo Gobind*, (1899) 26 Cal. 966; *Kadir Mohideen v. Muthukrishna*, (1902) 26 Mad. 230 (a sale for arrears of income-tax). For compromise decrees see *Anmamalai v. Malayandi*, (1906) 29 Mad. 426. P.C.; and *Moti Lal v. Preo Lal*, (1908) 13 C.W.N. 226=9 C.L.J. 96; *Raghubar v. Ghasite*, (1910) 13 O.C. 98=13 C. 750; *Jhuna v. Tara Chand*, (1918) 6 I.C. 168; *Sohan Lal v. Jot Singh*, (1913) 16 O.C. 145=20 I.C. 450; *Maharaja Bahadur Singh v. Sardar Narayan Singh*, (1915) 19

Lis pendens.

Where a mortgage decree obtained against a Hindu widow is being challenged in a suit by the reversioners, the purchaser at the sale during the pendency of the suit is affected by *lis pendens*.¹ Where the defendants in a suit for possession of property and profits had purchased the property in execution of a money decree obtained subsequently to the plaintiff's mortgage decree, though prior to the plaintiff's purchase of the same property in execution of his own decree, the defendants were purchasers *pendente lite* and were bound by the proceedings in the suit on the mortgage bond.² Similarly a person who had, during the pendency of the mortgagee's suit for sale, purchased the mortgaged property in execution of a simple money decree, is bound by the proceedings and the decree in the suit.³ In the case of a mortgage suit the *lis* continues after the decree *nisi* and the doctrine is applicable to all proceedings to realise a mortgage after a decree for

C.W.N. 152=28 I.C. 898; *Ram Doyal v. Ram Tanu*, (1911) 15 C.L.J. 137=11 I.C. 464; *Vedachari v. Narasimha*, (1924) 45 M.L.J. 825; *Jogeshwar v. Moti*, (1922) 66 I.C. 631; *Satgur v. Nandkumar*, (1917) 4 O.L.J. 135=40 I.C. 146; *Kunj Behari v. Ram Sahai*, (1915) 2 O.L.J. 327=38 I.C. 213; *Mathura Prasad v. Dasai Sahu*, (1922) 1 Pat. 287; *Ramdulari v. Upendranath*, (1925) 4 Pat. 61; *Bhaskar v. Shanker*, (1924) Bom. 467=80 I.C. 453; *Basawan v. Natha*, (1925) Oudh 30=82 I.C. 747; not if obtained by fraud and collusion; *Tinoodhan v. Trilokya Saran*, (1913) 17 C.W.N. 413=18 I.C. 177.

1. *Basawan v. Natha*, (1925) Oudh. 30=82 I.C. 747.

2. *Jharoo v. Raj Chunder*, (1885) 12 Cal. 299; *Raj Kishen v. Kalha Madhub*, (1874) 21 W.R. 349.

3. *Tinoodhan v. Trilokya*, (1913) 17 C.W.N. 413=18 I.C. 177; *Radhamadhub v. Manohur*, (1888) 15 Cal. 756 P.C.=15 I.A. 97; *Bhawani Koer v. Mathura Prasad*, (1907) 7 C.L.J. 1; so is a lease; *Kakur v. Gaya*, (1898) 20 All. 349; *Narain Patel v. Abdul Majid*, (1901) 15 C.P.L.R. 6; *Radhika v. Radhamani*, (1884) 7 Mad. 349; *Pannustsa Subbaraju v. Veegisina Seetaramaraju*, (1915) 17 M.L.T. 67=28 I.C. 232; *Madan v. Raj Kishori*, (1912) 17 C.L.J. 384=17 I.C.

sale;¹ because the protection given to the plaintiff *Lis pendens*. under section 52 of the Transfer of Property Act extends up to the final satisfaction of the conditional decree, since it might otherwise be rendered nugatory by the judgment-debtor's dealing with the mortgaged property during the period of grace allowed him by the decree during which time the decree-holder cannot apply for a decree absolute.

Where in a suit on a mortgage a preliminary decree was passed and before the final decree the mortgaged property was sold in execution of a money decree against the judgment-debtor the purchase is of no avail against the purchaser of the property subsequently in execution of the final decree for sale on the mortgage.²

The proceedings before an appellate court are but a continuation of those before the first court, notwithstanding that the decree of the first court might have been in favour of the auction-purchaser's predecessor in title,³ and the rule would apply even though no appeal was actually pending at the time when the purchase was made.⁴

When suits were brought for the purpose of re-

1. *Shivji v. Waman*, (1897) 22 Bom. 939; *Samal v. Babaji* (1904) 28 Bom. 361; *Surjiram v. Barhamdeo*, (1905) 2 C.L.J. 485 = 1 I.C. 213; *Parsotam v. Cheda Lal*, (1906) 29 All. 76 (foreclosure); *Lokenath v. Achutananda*, (1909) 2 I.C. 85; *Shivall v. Shamber*, (1905) 29 Bom. 435 F.B.; *Kunhi Umah v. Amed*, (1891) 14 Mad. 491; *Man Singh v. Amantaka*, (1915) 26 I.C. 879.

2. *Qudratulla v. Mt. Gulgandi*, (1925) Oudh 496 = 89 I.C. 570; *Premasukhdas v. Pir Khan*, (1926) 3 Nag. 21; *Lachiram v. Bholu*, (1925) Nag. 122 = 82 I.C. 452.

3. *Diraj v. Dinanath*, (1909) 6 N.L.R. 140. Quære as to the applicability of the doctrine between the decree *nisi* and the date of institution of proceedings to bring the property to sale.

4. *Gobind Chunder v. Guru Churn*, (1887) 15 Cal. 94; *Hakim Singh v. Charandas*, (1904) P.L.R. 19 F.B.; *Sukhadeo v. Jumna*, (1901) 23 All. 60.

Lis pendens. covering moneys due on mortgage bonds by sale of the mortgaged properties, no question as to the right to the properties having been involved, and the defendants not appearing, *ex parte* decrees were passed against them, it was held that the suits were not contentious and the doctrine did not apply.¹

The law of *lis pendens* was copied here from England and until 1839 the law in both the countries was the same. In that year, the English statute 2 and 3 Vic. C. 11 relieved purchasers of property with notice of the pending litigation and the amending Statute 23 and 24 Vic. C. 115 (section 2) provided for registration and these registers are open to search by intending purchasers. In India, there is no such provision for registration and the application of the doctrine is absolute.²

An auction-purchaser at a sale in execution of a decree is not a "subsequent transferee" within the meaning of section 53 of the T. P. Act entitled to impeach a previous transfer.³

Where the mortgagors who had no title to the property at the time of the mortgage subsequently acquired title thereto by purchases and, on reference to arbitration by the mortgagors and the mortgagee, an award was passed empowering the latter to sell the property in satisfaction of his debt, and after the presentation of the award in Court, a holder of a decree for money against the mortgagors attached

1. *Dinonath v. Shama Bibi*, (1900) 28 Cal. 23. See also *Kishory Mohun Veilhammed*, (1891) 18 Cal. 188 and *Chandra Koomar v. Gopu Kristo*, (1873) 20 W.R. 204; *Humade v. Secretary of State*, (1908) 31 Mad. 269.

2. *Upendro Chandra v. Mohi Lal*, (1904) 31 Cal. 745. But see *Krishnappa v. Shivappa*, (1907) 31 Bom. 393.

3. *Awadhut v. Punjaji*, (1919) 53 I.C. 208; *Vasudev v. Janardhan*, (1915) 39 Bom. 507.

the property and brought it to sale ; in a suit by the mortgagee against the auction-purchaser it was held that the defendant, the purchaser under the money-decree, could not defeat the plaintiff's right as mortgagee to sell the property in satisfaction of his debt. The presentation in Court of the award obtained by the plaintiff was equivalent to the presentation of a plaint for the specific performance of the contract of mortgage ; and the proceedings consequent thereon constituted a *lis pendens* during which a mere money-decree-holder could not, by any proceedings which he might take, defeat the object of the plaintiff's application in Court to file the award.¹

Lis pendens.

The question whether the auction-purchaser is a representative of a party to the suit within the meaning of section 47 C.P. Code has already been discussed.² In Nagpur it is held that he is not a representative of the judgment-debtor and as such cannot apply to set aside a sale³ and that he is a representative of the decree-holder.⁴ He is not a party to the suit within the meaning of that section.⁵

Representation.

Under section 66, C. P. Code, 1908,

“(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Benami purchases.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser

1. *Pranjivan Govardhjandas v. Bau*, (1880) 4 Bom. 34.

2. Vol. I. 184 et seq. See *Ishar Das v. Parmanund*, (1926) 6 Lah 544; *Hari Mohan v. Purendra Nath*, (1925) 93 I.C. 955.

3. *Balwant v. Ratan Lal*, (1923) Nag. 161=68 I.C. 429.

4. *Hairam v. Kalicharan*, (1925) 8 N.L.J. 184.

5. *Azam Khan v. Umed Ali*, (1925) Cal. 1223=85 I.C. 750.

Benami
purchases.

certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."¹

This section has no retrospective operation and does not apply to an execution-purchaser whose title was perfected when section 317 of the C. P. Code of 1882 was in force.² This is a penal provision and must be construed strictly and literally.³ The rule applies only to sales under the Code and purchasers at revenue sales or under the Public Demands Recovery Act can prove their real title.⁴

1. This corresponds to section 317 of the C. P. Code, 1882, which ran thus:—

"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims. Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser."

This corresponded to Act VIII of 1859, s. 260.

2. *Promothonath v. Sarav Dasi*, (1920) 47 Cal. 1108 ; *Promode Kumar v. Madan Mohan*, (1923) Cal. 228=70 I.C. 555 ; *Assad Ali v. Bujrus Meher Bibi*, (1915) 29 I.C. 716. But see contra in Allahabad, (1921) 43 All. 416 ; *Gayaprasad v. Lareti Kuar*, (1914) 25 I.C. 821 ; *Abdul Jalil Khan v. Obed-Ullah*, (1921) 43 All. 416.

3. *M. S. Buhuns Kunwar v. Lalla Buhoree Lall*, (1872) 14 M.I.A. 496 ; *Raj Chunder v. Dinanath*, (1898) 2 C.W.N. 433 ; *Nakori v. Sarup Chunder*, (1901) 5 C.W.N. 341 ; *Abdul Hamid v. Mohamed Sharif*, (1920) 2 Lah. L.J. 353.

4. *Venkatachellam v. Purushottam*, (1909) 19 M.L.J. 270 ; *Sulaiman v. Pattuna*, (1910) 9 M.L.T. 294 ; *Fazal v. Imam*, (1887) 14 Cal. 583. For special laws, sales for arrears of revenue, see *Appaji v. Rustuma*, (1897) B.P.J. 27 ; *Thirumalayappa v. Swami Naikar*, (1895) 15 Mad. 469 ; *Subbarayar v. Asirvatha*, (1897) 20 Mad. 494 ; *Muthuvaiyan v. Sinnasamivayyan*, (1905) 28 Mad. 526 ; *Ambica v. Gopal*, (1905) 1 C.L.J. 550 ; *Bengachandra v. Tarakinkar*, (1912) 16 C.L.J. 412=15 I.C. 291.

To be a "certified purchaser," the certificate need not have been actually issued to the purchaser,¹ and in the event of a plea under this section, the certificate may be produced at the trial.² Benami purchases.

Under Section 317 of the C. P. Code, 1882, no suit could be maintained *against a certified purchaser* and under the present Code no suit can be maintained against *any person claiming title under a purchase certified by the Court*.³ The view taken under the C. P. Code of 1882, that a suit against a person other than the certified purchaser though claiming from him is not barred,⁴ is no longer law.⁵

This section is aimed at benami purchases in execution sales and is intended to stop benami purchases by making it impossible for the real owner to question the benamidar's title.⁶

1. *Binda Ali v. Ameerun*, (1876) 25 W.R. 493; but see *Bodh Singh v. Ganesh Chunder*, (1873) 19 W.R. 356.

2. *Aldwall v. Ilahi Baksh*, (1883) 5 All. 478, *Devidas v. Pirjada*, (1894) 8 Bom. 277. For sale certificates, see page 1 *supra*.

3. *Gaya Prasad v. Lareti Kuar*, (1914) 12 A.L.J. 1145=25 I.C. 821; *Narain Dei v. Durga Dei*, (1912) 10 A.L.J. 97=16 I.C. 489; *Easin v. Intigerenessa Bibi*, (1920) 25 C.W.N. 659=58 I.C. 745; *Assad Ali v. Bujrus Meher Bibi*, (1915) 29 I.C. 716; *Laxman v. Govind*, (1920) 16 N.L.R. 87=55 I.C. 499; *Ashfaq Husain v. Syed Nazir*, (1919) 22 O.C. 222=53 I.C. 961; *Sarju Prasad v. Bindeshari Baksh*, (1911) 33 All. 382.

4. These words give effect to the decision in *Hari Govind v. Ram Chandra*, (1907) 31 Bom. 61. See also *per* Sadasiva Iyer, J. in *Kandaswamy v. Rangaswami*, (1912) 36 Mad. 564.

5. *Dukhda v. Srimonto Joardar*, (1899) 26 Cal. 950; *Raj Chunder v. Dinonath*, (1898) 2 C.W.N. 435; *Nakori v. Sarup*, (1901) 5 C.W.N. 341; *Nisakar Das v. Bairagi Samal*, (1913) 19 C.L.J. 330=19 I.C. 909; *Johan Buksh v. Mohammad Taslim*, (1916) 32 I.C. 963; *Theyyavelan v. Kochan*, (1898) 21 Mad. 7; *Piramanayagan v. Ramachandra*, (1908) 18 M.L.J. 305; *Muhammad v. Abdul Hakim*, (1904) P.R. 4; *Narain v. Durga*, (1913) 35 All. 138.

6. *Hanuman Pershad v. Jadunandan*, (1915) 43 Cal. 20.

Benami
purchases.

It is not restricted in its application to benami purchases made by or on behalf of judgment-debtors.¹ When the decree-holder asked a stranger to purchase at the sale for him after obtaining leave to bid, but the stranger purchased without leave to bid and in his own name, a suit by the decree-holder for recovery of the property is barred by this section.²

A suit for a declaration that the purchase by a certified purchaser is benami for the plaintiff is barred by this section.³ But in Burma, it has been held that when the certified purchaser is not in possession and the person in possession asks for a declaration of his real ownership, the suit is not barred by this section.⁴ It has also been held in Nagpur that if the plaintiff was in adverse possession against a certified purchaser for over 12 years, his claim for a declaratory decree cannot be rejected on the ground that he was a trespasser.⁵

This section bars the jurisdiction of the Court only when the plaintiff claims that the purchase

1. *Harish Chandra v. Nripendra Coomar*, (1921) 29 C.W.N. 1024=59 I.C. 719. See *Jai Inder Bahadar v. Sheo Inder Bahadar*, (1924) 78 I.C. 393.

2. *Maharaj Bahadur v. Nawal Kishore*, (1925) Nag. 41=82 I.C. 541.

3. *Durga v. Bhagwan*, (1901) 23 All. 34; *Bishan v. Ghazi-uddin*, (1901) 23 All. 175; *Khunda v. Aziz*, (1905) 27 All. 194; *Baijnath v. Bishen Devi*, (1921) 43 All. 711; *Chidambaram v. Subramania*, (1916) 1 M.W.N. 220=32 I.C. 434; *Sitara Begam v. Muhamad Ishaq*, (1916) 2 O.L.J. 584=32 I.C. 365; *Sowcar Kamurudeen v. Noor Mohamad*, (1915) 28 M.L.J. 251=28 I.C. 205; *Umashashi v. Akrur Chandra*, (1925) 53 Cal. 297, dissenting from *Karamuddin v. Niamut*, (1892) 19 Cal. 199; *Sashi Churn v. Annopurna*, (1896) 23 Cal. 693.

4. *Myat Gale v. Santha*, (1914) 7 L.B.R. 260=25 I.C. 810; *Johan Buksh v. Mohammad Tashin*, (1916) 32 I.C. 963.

5. *Larman v. Govind*, (1920) 16 N.L.R. 87=55 I.C. 499; *Mt. Mahmudunnissa v. Syed Zahid Raza*, (1925) Oudh. 20.

was made on his behalf or on behalf of some one through whom the plaintiff claims; in other words, it bars an inquiry on the question whether the certified purchaser is the real or nominal purchaser. It provides that the certified purchaser should be conclusively deemed to be the real purchaser and shall not be ousted on the ground that his purchase was really made for the benefit of another. It does not avoid benami purchases or declare them illegal, but when such purchases are made at court-sales, it bars the legal remedies by which they might otherwise be enforced.¹ The section does not therefore affect in any way the title of persons otherwise beneficially interested in the purchase.²

Benami
purchases.

The section does not bar a suit between two persons claiming through the certified purchaser.³ Where a person purchased property in the name of one and it is alleged by another that it was in trust for him, a suit between the two claimants is not barred by this section.⁴ Where out of two mortgagees one alone sued for sale making the other mortgagee a co-defendant and in execution of the decree purchased the property himself, a suit by the other joint mortgagee for a share in the purchase is not barred by this section.⁵ A suit by the princi-

1. *Bikram Ahir v. Rajpati Lal*, (1921) Pat. 21; 62 I. C. 720; *Mahammed Emartulla v. Mahammed Didar Bux*, (1920) 24 C.W.N. 51=54 I. C. 127; *M. S. Buhuns Kowar v. Lalla Buhoree Lal*, (1872) 14 M. I. A. 496.

2. *Ganga Sahai v. Kesri*, (1915) 37 All. 545 P.C.; *Bodh Singh v. Gunesh Chander*, (1873) 19 W. R. 356; *Jai Inder Bahadur v. Thakur Inder Bahadur*, (1924) Oudh 218=78 I. C. 393; *Thakur Jai Inder v. Thakur Bachun*, (1924) Oudh 218=83 I.C. 383.

3. *Joy Gobinda Chowdhury v. Debendranath*, (1918) 46 I. C. 216.

4. *Ramaswami Aiyar v. Venkappa Iyer*, (1916) 3 L. W. 233=33 I. C. 1000; *Aghore Nath v. Ramchurn*, (1896) 23 Cal. 805.

5. *Ramjas Das v. Mohan Lal*, (1914) 25 I. C. 735; *Naipal Sonar v. Sheo Narain*, (1910) 7 A. L. J. 1091=6 I. C. 374;

Benami
purchases.

the family funds was held barred under this section and it made no difference that the mother had a right of maintenance against the joint family.

But this view was not accepted by the Madras High Court. In *Nataraja Mudaliar v. Ramaswami Mudaliar*,¹ it was held that there was nothing in section 66 to prevent a member of a joint family from recovering the property which had been bought out of the money belonging to the joint family *in the name of some person* benami at a court-sale by the managing member of the family, he himself being the decree-holder. Their Lordships distinguished *Suraj Narain's case* as under the C. P. Code of 1882 and said that the C. P. Code of 1908 altered the law: Under the former Code the prohibition was "on the ground that the purchase was made on behalf of any person or on behalf of some one through whom such other person claims" and under the present Code, it is "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." "The obvious alteration" said Schwabe J. "that now the personal provision is confined to purchases on behalf of a plaintiff or persons through whom he claims, where as before it was wide enough, on one interpretation of it, to cover purchases on behalf of any other person. I should think that alteration was made, because, on what I may call the Allahabad interpretation, there might be an injustice. For it would follow that infants whose father using the infant's

1. (1922) 45 Mad. 856; *Natesa Ayyen v. Venkatrammayyan* (1883) 6 Mad. 155; *Krishna Ayyan v. Raghaviyyan*, (1899) 9 M. L. J. 298; *Minakshi v. Kalianarama*, (1897) 20 Mad. 349. But see *Ram Kurup v. Sridevi*, (1893) 16 Mad. 290.

property entered into such a transaction, would be deprived, though perfectly innocent themselves, of their family property, and that it would remain in the hands of a benamidar. It was therefore desirable that the inability to enforce rights should be restricted to the person who was guilty of the act which was thought upon as an illegal act.”

Benami
purchases.

A suit is not barred under this section unless the plaintiff is one who claims to be a beneficial owner or his representative and the defendant is a certified purchaser or one claiming through him.¹

In *Kollantavida v. Tirubalil*,² a property subject to two mortgages, one of 1881 and the other of 1882 was sold under a money decree purchased by A and later on sold under the mortgage of 1882 and purchased by B. In the latter suit on the mortgage A was not a party. If in a suit by B to redeem the mortgage of 1881, B could prove that the purchase by A was benami for the mortgagors, there was no bar to that assertion under this section.

In *Monappa v. Surappa*,³ the Madras High Court held that where after obtaining the certificate of sale, the purchaser acknowledged that his purchase was benami and gave up possession or did some act which unequivocally indicated an intention to waive his right, or to restore the property to the real owner, the fresh act might, by reason of the antecedent relation between the parties, operate as a valid transfer of property, the reason being that benami purchases are not made illegal, though

1. *Abdul Hamid v. Mohamed Sharif*, (1920) 2 Lah. L. J. 353; *Sheetanath v. Madhub*, (1864) 1 W. R. 329; *Khyratali v. Syfoollah*, (1868) 8 W. R. 130; *Muhmudumissa v. Zahid Raza*, (1925) Oudh 20 = 84 I.C. 98.

2. (1817) 20 Mad. 362.

3. (1887) 11 Mad. 234.

Benami
purchases.

the real purchaser is disabled from maintaining a suit against the certified purchaser on the sole ground that he was only a benamidar. But in *Bishan Dial v. Ghaziuddin*,¹ the Allahabad High Court would not adopt this view and said that mere permission to hold possession would not amount to a transfer of title from the benamidar to the real owner and that the suit by the latter would be barred under this section.

The section bars a suit against the certified purchaser or his assigns, but when the certified purchaser sues the person claiming to be real owner, the latter is not precluded from proving his real ownership,² for it was said that "it was merely a rule of procedure applicable to the trial of a certain class of suits in which the certified purchaser had a certain position in the array of parties " and " it was a special plea by way of defence available only to the auction-purchaser when he was a defendant to the suit and chose to avail himself of the plea.³ When therefore the certified purchaser does not defend the suit or confesses judgment, the plea is not available to the other defendants.⁴

1. (1901) 23 All. 175.

2. *Lokhee Narain v. Kalypuddo Bandopadhyaya*, (1875) 23 W.R. 358 P.C.; *Muthooranath v. Raikomul*, (1876) 24 W.R. 278; *Karamuddin v. Niamut*, (1892) 10 Cal. 199; *Raza Hussain v. Didar*, (1900) 3 O. C. 229; *Jan Muhammad v. Ilah Baksh*, (1876) 1 All. 390; *Mt. Buhuns Kowar v. Lala Buhocree Lali*, (1872) 14 M.I.A. 496; *Hiralal v. Gopika*, (1915) 11 N.L.R. 130=31 I.C. 58; *Tanji Dagade v. Shanker*, (1906) 30 Bom. 116; *Harichand v. Krishindas*, (1896) 9 C.P.L.R. 55. See contra *Jokhee Lall v. Homs Kooer*, (1868) 10 W.R. 167.

3. *Gaya Prasad v. Lareti Kuar*, (1914) 25 I.C. 821.

4. *Haji Arjun Mullick v. Sheikh Farutullah*, (1881) 9 C. L. R. 295; *Ramakrishnappa v. Adinarayana*, (1885) 8 Mad. 511; *Ravji v. Mahadev*, (1897) 22 Bom. 672; *Monappa v. Senappa*, (1888) 11 Mad. 234; *Jamhu Das v. Jaiprakash*, (1925) All. 47=82 I.C. 344.

The section contemplates a sale in execution of a real decree in a real suit and does not bar a suit by a party to the proceedings for possession of property purchased in a fictitious sale in execution of a fictitious decree.¹ Benami purchases.

Where the benamidar does not claim under the sale certificate, the section does not apply.² This section does not apply to a sale by a receiver with the approval of the Court because in such a case there is no sale certificate nor an order of confirmation of the sale.³

This section does not bar a suit to enforce the specific performance of an agreement by the auction-purchaser subsequently to the auction-purchase to convey the property purchased to the plaintiff, though the plaint alleges that the certified purchaser was a benamidar for the plaintiff;⁴ and the same view was taken when the agreement with the purchaser was before the sale.⁵

In *Gullapalli Venkataramayya v. Koonaparaju Venkataraju*,⁶ the Madras High Court took what may be called a crusade against this section. Their

1. *Akhil Prodhan v. Manmathnath*, (1915) 18 C.L.J. 616=27 I.C. 230.

2. *Saradindu v. Gosta Behari*, (1923) Cal. 302=75 I.C. 196 ; *Ram Khelawan v. Asgar Ali*, (1916) 36 I.C. 681.

3. *Narain Das v. Ram Chandra*, (1925) 90 I.C. 116.

4. *Venkatappa v. Jalayya*, (1919) 42 Mad. 615 F.B. ; *Ramathai Vadivelu Mudaliar v. Peria Manicha Mudaliar*, (1920) 43 Mad. 643 P.C. ; *Baburam Mandal v. Dokhina Sundari*, (1920) 24 C.W.N. 27=54 I.C. 726 ; *Kumara v. Srinivasa*, (1888) 11 Mad. 293 ; *Mor Joshi v. Muhammad*, (1873) 10 B.H.C.R. 344.

5. *Abdulla Khan v. Jalam Singh*, (1923) Nag. 11 ; *Bikram Ahir v. Rajpati Lal*, (1921) Pat. 21=62 I. C. 720 [explaining the contrary view taken in *Muneshwar v. Kailash Pati*, (1919) 50 I.C. 546.] See *Subramaniam v. Gopalarama*, (1915) 29 I. C. 138.

6. (1917) 31 M.L.J. 877=37 I.C. 497.

Benami
purchases.

Lordships said that the section was designed to protect the person who had obtained a sale-certificate and had acquired possession under it and that when the purchaser sought to recover possession, the suit must be deemed to be a suit in ejectment, so that if the certified purchaser was only a benamidar and not a real owner, the suit must be dismissed because a benamidar cannot maintain a suit in ejectment. It made no difference in the opinion of their Lordships that the suit was occasioned by obstruction to delivery of possession under Order 21 rules 97 to 103, C. P. Code.

A manager guilty of fraud cannot take shelter under this section as against his ward.¹

If an auction-purchaser allows a stranger to be in possession for a long time and attested a sale deed executed by him to re-assure the purchaser, it was held that he was estopped from raising a plea under this section and if after such sale the auction-purchaser got a sale certificate from the Court it was fraud.²

This section does not bar a suit for a declaration that the name of the certified purchaser was inserted fraudulently or without the real purchaser's consent.³ Where a person purchased property at court-sale and after paying the deposit of 25% received money from another agreeing that he could be joint owner of the property, the latter could not sue for a decla-

1. *Noni Gopal Basu v. Tareesh Chandra*, (1915) 30 I.C. 212.

2. *Kandaswami v. Rangaswami*, (1912) 36 Mad. 564.

3. *Hemanginee v. Jogindro*, (1869) 12 W.R. 236; *Koosumba v. Tuffuzzul*, (1870) 13 W.R. 85; *Ganga Baksh v. Rudar Singh*, (1900) 22 All. 434; *Natesa v. Venkatrama*, (1883) 6 Mad. 135; *Rai Chunder v. Dinanath*, (1898) 2 C.W.N. 433.

ration under sub-rule (a) of this section, but could sue for specific performance of the agreement.¹ Benami purchases.

When two persons contribute jointly towards the purchase of property in court auction, but the sale certificate stands in the name of one of them, it is a joint transaction constituting the parties co-purchasers and not a benami transaction falling under this section.²

This section does not interfere with the rights of third parties to proceed against property liable to satisfy their claim, though the property may stand in the name of another person as the certified purchaser.³ The contrary view taken in Madras and Allahabad under the C. P. Code of 1882 is therefore no longer law.

1. *Babu Ram v. Dakhina Sundari*, (1920) 24 C.W.N. 27=54 I.C. 726.

2. *Visvanath v. Pandarinath*, (1926) 50 Bom. 600.

3. *Sohun Lall v. Gya Pershad*, (1874) 6 N.W.P. 265; *Puran Mal v. Ali Khan*, (1876) 1 All. 235; *Uncovenanted Service Bank v. Abdul Bari*, (1896) 15 All. 461; *Delhi and London Bank v. Pertab*, (1899) 21 All. 29; *Satapa v. Karbasapa*, (1870) 7 B.H.C.R. 21; *Kanizak v. Monohur*, (1886) 12 Cal. 204; *Subba Bibi v. Hari Lal*, (1894) 21 Cal. 519; *Mongola Swayi v. Visvanatha*, (1920) 37 M.L.J. 586=54 I.C. 967.

Kishun Lal v. Gururdhwaja, (1899) 21 All. 238; *Rani Narain v. Mohonian*, (1904) 26 All. 82; *Khuda Baksh v. Aziz Alam*, (1905) 27 All. 194; *Sarju Prasad v. Bindeshri*, (1911) 38 All. 332; *Durga Prasad v. Bhagwan Das*, (1900) 20 A.W.N. 190; and *Khuda Baksh v. Aziz Alan*, (1904) 24 A.W.N. 226 are overruled by the last part of section 66 of the present Code.

CHAPTER XXV

Estoppel in Execution

Estoppel—Definition—Classification at Common Law—Estoppel by record—Estoppel by deed—Estoppel *in pais*—By conduct—By contract—Distinction not preserved in India—Estoppel by record covered by the law of Res judicata—*Duchess of Kingston's case*—Civil Procedure Code, section 11—Application to execution proceedings—Successive applications—Orders in execution final—If made on notice—Instances of orders final—Instances of orders not final—Notice before execution—Requisites of valid notice to create finality—Pleas allowable on notice—Orders on appeal—Estoppel in pais—*Carr v. London and N. W. Ry. Co.*—Summary of the rules—Estoppel is a personal bar—Purchase subject to mortgage—Doctrine does not rest on notice of duty—Delay and acquiescence—Attestation—Inconsistent positions—Persons generally affected by estoppel—Decree-holder—Execution-purchaser—In simple money-decrees—In mortgage-decrees—Judgment-debtor—As affected by estoppel—As benefitted by estoppel—Instances of no estoppel.

Estoppel.
Definition.

Estoppel is a principle of law whereby a person is prevented from gain saying what he has said, done or permitted to be done to the prejudice of another. At Common Law there were three kinds of estoppel, by record, by deed and *in pais*. Estoppel by record is embodied in the rules relating to res judicata of the Civil Procedure Code,¹ and in the provisions relating to relevancy or admissibility of judgments of Courts of Justice contained in the Indian Evidence Act.² Estoppel by deed, in its strict application, does not exist in India.³ It is preclusion

1. Act of 1908, Ss. 11-14.

2. Act of 1872, Ss. 40-44.

3. *Zamindar Serimutu v. Virappa*, (1864) 2 M. H. C. R. 174; *Paran v. Lalji*, (1877) 1 All. 403; *Donzelle v. Kedarnath*, (1871) 7 B. L. R. 720; *Gokaldas v. Puranmal*, (1884) 10 Cal. 1035; *Raja Sahib v. Bhudhu*, (1869) 12 M. I. A. 275.

against the competent parties to a valid sealed contract and their privies to deny its force and effect by any evidence of inferior solemnity.¹ Estoppel *in pais* under the Common Law sprang from livery of seisin, entry, acceptance of rent and partition or acceptance of an estate. But since the time of Coke estoppel *in pais* came to embrace cases never contemplated by him, so that in the modern sense it falls into two classes, estoppel by conduct and estoppel by contract. The Indian Evidence Act does not in terms preserve this distinction, but has restated the rules in sections 115 to 117.

Classification at Common Law.

Distinction not preserved in India.

The estoppel of a record as a judgment falls under the head of *res judicata*. Estoppel prohibits the party from proving anything which contradicts his previous declarations or acts, to the prejudice of a party who, relying on them, altered his position. *Res judicata* ousts the jurisdiction of the Court and prohibits the Court from enquiring into a matter already adjudicated upon. *Res judicata* prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence.²

Estoppel by record.

The rule of *res judicata*, as stated in the *Duchess of Kingston's Case*,³ had been adopted in India even before the Code of Civil Procedure of 1859. Under the Codes of 1877 and 1882, the original expression of the law as contained in the Code of 1859 was considerably extended and the Code of 1908 enacts⁴ :—

Duchess of Kingston's case.

1. *Bowman v. Taylor*, 2 A & E. 273. See *Tirumala v. Pingala*, (1863) 1 M. H. C. R. 312.

2. *Sitaram v. Amir*, (1886) 8 All. 332; *Cassamally v. Sir Currimbhoy*, (1911) 35 Bom. 215.

3. 2 Smith's L. C. 731.

4. S. 11.

C. P. Code,
s. 11.

“ No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation 1 :—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II :—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III :—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV :—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V :—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI :—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the pur-

poses of this section, be deemed to claim under the persons so litigating."

But this section is not exhaustive of the effects of the principle of *res judicata*.¹ Orders in execution proceedings or interlocutory orders, if not appealed from, are binding on the parties in all subsequent proceedings in the same suit; for the principle underlying that section is equally applicable to them as to regular suits. So said the Judicial Committee: "It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit or as a final judgment in a suit is binding upon them in carrying the judgment in execution. The binding force of such a judgment depends, not upon section 17 of Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation." 'Res judicata' in the case of execution proceedings is therefore not strictly correct.² But in *Manyarath v. Venkatesh*,³ it was said that because an order made under section 244 of the C. P. Code of 1882 was a decree and a decree is "a formal adjudication upon any right claimed or defence set up in a civil court when such adjudication so far as regards the court expressing it decides the suit or appeal," it might be said that any proceeding which terminates in a decree is a suit within the meaning

Application
to execution
proceedings.

1. *Mhancharam v. Kalidas*, (1894) 19 Bom. 826; *Ramachandra Rao v. Ramachandra Rao*, 45 Mad. 331 P. C.; *Mt. Sahibzadi v. Muhammad Umar*, (1926) 96 I.C. 1002.

2. *Ram Kirpal v. Rup Kuari*, (1883) 6 All. 269; *Mungat v. Girija Kant*, (1881) 8 Cal. 51 P. C. See also *Kalyan v. Jagan*, (1915) 37 All. 889; *Binda Prasad v. Raj Ballah*, (1926) 48 All. 245; *Dip Prakash Dwarka Prasad*, (1926) 48 All. 201; *Raghubar Singh v. Gokaran*, (1926) Oudh 291.

3. (1881) 6 Bom. 54; *Ramdal v. Deodari Rao*, (1923) 2 Pat. 772.

of the Code, so that the rule of *res judicata* would be directly applicable to orders in execution proceedings under section 244.

Successive
applications.

There is nothing to prevent successive applications for execution. The limitation that is imposed on all these applications is that if there has been a previous application in which there has been a definite decision affecting a particular person or property and that decision is unreversed by appeal or suit or otherwise, that decision is final and binds the parties in subsequent proceedings. To that extent and that extent only, there is a limitation on successive applications in execution.¹

Orders in
execution
final.

Where at one stage of an execution proceeding an order is made disallowing the objections of the judgment-debtor, the order is binding on him in all subsequent stages of the same execution,² and it made no difference whether the order was by agreement or by adjudication.³

The decision of a competent Court on an application for execution has the effect of *res judicata* even though that decision was passed on an *ex parte* application, provided that the opposite party was given an opportunity to appear.⁴ But a mere ex-

1. *Kapurchand v. Kanhaiya Lal*, (1924) 45 All. 735.

2. *Masirunnissa v. Joy Chand*, (1912) 16 I.C. 238; *Bindu Bashini v. Keshab Lal*, (1918) 21 C.W.N. 945=37 I.C. 66; *Doorvasi Seshadri Aiyar v. Govindaswami*, (1921) M.W.N. 344=63 I.C. 189; *Thangji Shettithi v. Dujia Shetti*, (1918) M.W.N. 748=48 I.C. 226; *Madlidi Dorayya v. Satti Veerayya*, (1918) M.W.N. 143=44 I.C. 4; *Mahadeo Prasad v. Gajadhar*, (1923) 73 I.C. 359; *Kohitindra Mohan v. Nawab Khajee*, (1921) 64 I.C. 724; *Faghubar v. Sattoo*, (1926) All. 220; *Mohomed Yusuf v. Mt. Amtul Habib*, (1926) 95 I.C. 31.

3. *Kalidas v. Prasanna Kumar*, (1920) 47 Cal. 446.

4. *Gopal v. Kondo*, (1884) 9 Bom. 828; *Subbiah v. Ramanathan*, (1914) 37 Mad. 462; *Brajilal v. Atkinson*, (1920) 5 Pat.

parte order in favour of one party, without an opportunity being offered to the opposite party to put forward his objection if any on the particular point involved in the subsequent order does not operate as *res judicata* and to conclude the parties the previous order must have been passed on contest.¹ So when an application for execution or objection against it was withdrawn or dismissed for default, it must be treated as not made at all.² But an order for dismissal for default will not affect

If made on notice.

L.J. 639=57 I.C. 707 ; *Gauri Shankar v. Lachman Kunwar*, (1916) 18 O.C. 374=33 I.C. 663 ; *Subbaraya v. Muthammal*, (1914) 22 I.C. 780 ; *Nagappa Chetty v. Muthuraman Chetty*, (1925) Mad. 159=78 I.C. 12 ; *Sarju Prasad v. Mukandhan*, (1922) M.W.N. 793=73 I.C. 882 P.C.

1. *Sheik Budan v. Ramchandra*, (1887) 11 Bom. 537 ; *Mochi Mandal v. Meseruddin*, (1910) 13 C.L.J. 26=9 I.C. 213 ; *Sobran v. Sabilas*, (1920) 54 I.C. 933 ; *Jugal Kishore v. Chintamoney*, (1915) 18 C.W.N. 1288=20 C.L.J. 15=27 I.C. 225 ; *Gour Moni v. Jugat Chandra*, (1889) 17 Cal. 57 ; *Balmakund v. Ashfaq*, (1912) 34 All. 518 ; *Ilam Mollah v. Mamindra Mohan*, (1920) 31 C.L.J. 382=56 I.C. 801 ; *Motilal v. Ibrahim*, (1883) A.W.N. 19 ; *Ramasami v. Ramasami*, (1907) 30 Mad. 225 ; *Ishwardas v. Dosibai*, (1882) 7 Bom. 316 ; *Maszan v. Sarat Kumari*, (1910) 11 C.L.J. 357=5 I.C. 89 ; *Varadiah v. Rajakumara Venkataperumal*, (1914) 26 M.L.J. 83=21 I.C. 782 ; *Sobran v. Sibilas*, (1920) 54 I.C. 933 ; *Ramudu Chetty v. Varadaraja*, (1923) 13 L.W. 289=62 I.C. 480. See also *Sriharu v. Murari*, (1886) 13 Cal. 257.

2. *Hari Ganesh v. Yamunabai*, (1893) 23 Bom. 35 ; *Tirthasami v. Annappayya*, (1895) 18 Mad. 131 ; see also *Hurrooordary v. Jugbundhoo*, (1881) 6 Cal. 203 ; *Shafat v. Hurmat*, (1895) A.W.N. 18 ; *Bholanath v. Prafullanath*, (1900) 28 Cal. 122 ; *Hiralal v. Durja Chandra*, (1905) 3 C.L.J. 240 ; *Kaniz v. Muhammad Jafar*, (1910) 13 O.C. 90=6 I.C. 747 ; *Ramachandar v. Puttu Lal*, (1911) 8 A.L.J. 844=11 I.C. 980 ; *Mon Mohan v. Dwarka Nath*, (1910) 12 C.L.J. 312=7 I.C. 55 ; *Periakaruppan v. Chidambara*, (1916) 3 L.W. 339=33 I.C. 443 ; *Ritu v. Babu Alakhdeo*, (1918) 5 Pat. L.W. 208=47 I.C. 154 ; *Hira Lal v. Dviya Chandra*, (1905) 10 C.W.N. 209=3 C.L.J. 240 ; *Babu Das v. Girish Chandra*, (1923) Cal. 287=67 I.C. 663 ; *Cherathi v. Raman Nair*, (1905) 15 M.L.J. 243.

the bar if the application was so dismissed after the adjudication was made.¹ But where on receipt of notice under section 248 the judgment-debtors filed objections, but on the day fixed for hearing therein, the objections were disallowed for default, they became estopped from pleading the same objections in a subsequent execution proceeding, and this notwithstanding that the former application was afterwards struck off for non-payment of process fees.²

Instances of
orders final.

Where a point of law was raised and decided,³ where an application for execution was rejected for want of jurisdiction,⁴ where the Court passed an order holding that the application was in accordance with law,⁵ disallowing execution or allowing execution as

1. *Periakaruppan Chetty v. Chidambara*, (1916) 3 L.W. 339 = 33 I.C. 443, on appeal from (1915) 2 L.W. 1055 = 31 I.C. 293; *Mt. Pura v. Behari Lal*, (1923) Nag. 1 = 68 I.C. 239; *Gourchandra v. Janardhan*, (1923) Pat. 180 = 68 I.C. 337.

2. *Sheeraj v. Kameshar*, (1902) 24 All. 282 (distinguishing *Tilashar v. Parvati*, (1893) 15 All. 198, on the ground of hearing date being Sunday and dismissal was subsequently without notice). See *Narayana v. Gopalakrishna*, (1904) 28 Mad. 355; *Brajlal v. Atkinson*, (1901) 5 Pat. L.J. 632 = 57 I.C. 707.

3. *Raja Thakur Barham v. Ananta Ram*, (1905) 2 C.L.J. 584; *Wahdumal v. Tharo*, (1909) 4 I.C. 478; *Bijai v. Haiyat*, (1889) A.W.N. 163.

4. *Nabi v. Jwala Prasad*, (1904) 27 All. 148.

5. *Sheoraj v. Kamestiar*, (1902) 24 All. 82; *Shujat Ali v. Ajudhia Prasad*, (1882) 2 A.W.N. 151; *Kalicharan v. Sharaf Ali*, (1884) 9 A.W.N. 39; *Mungul v. Girijakant*, (1881) 8 Cal. 51 P.C.; *Tarsi Ram v. Man Singh*, (1886) 8 All. 492; *Kazee Bunday v. Romesh Chunder*, (1883) 9 Cal. 65; *Manjunath v. Venkatesh*, (1882) 6 Bom. 54; *Lakshman v. Kutayan*, (1901) 24 Mad. 669; *Khisal v. Ukiladdi*, (1909) 14 C.W.N. 114 = 3 I.C. 47; *Masirunnissa v. Joychand*, (1912) 16 I.C. 233; *Bindu Bashini v. Keshab Lal*, (1917) 21 C.W.N. 945 = 37 I.C. 66; *Besheshwar v. Rup Kishore*, (1917) 3 Pat. L. W. 13 = 41 I.C. 675; *Maharaja Kesho Prasad v. Harbans Lal*, (1919) 53 I.C. 85; *Prabhulingappa v. Gurunath*, (1921) 45 Bom. 453; *Desiappa v. Dundappa*, (1920) 44 Bom. 227; *Ramchandra v. Shrinivas*, (1922) 46 Bom. 467;

in time as barred by limitation,¹ or declared that the decree is or is not executable,² or has been satisfied³ or treated the decree as one allowing interest,⁴ or fixing the rate of interest,⁵ or construed the decree as enforceable not against the ancestral property of the judgment-debtor but against what has come to by way of inheritance,⁶ or held that a puisne mortgagee was not entitled to notice under Order 21 rule 66,⁷ or decided that particular property was saleable,⁸ decided on the liability for and the amount of mesne profits,⁹ such an order is conclusive between the parties in further execution proceedings. So where the question as to the personal liability of the judgment-debtor to satisfy the decree was raised and

Instances of
orders final.

Gadigappa v. Shidappa, (1924) 48 Bom. 638; *Desiappa v. Dandappa*, (1918) 42 Bom. 227; *Amir Ali v. Gopal Das*, (1920) 54 I.C. 924; *Raja of Ramnad v. Velusami* (1921) M.W.N. 51=59 I.C. 880 P.C.; *Mt. Muhamaddi Begam v. Mt. Nanda Begam*, (1922) All. 100=66 I.C. 751; *Kidarnath v. Radha Kishen*, (1922) 67 I.C. 56.

1. *Nanda Rai v. Raghunandan*, (1885) 7 All. 282; *Jaganath v. Behari Lal*, (1923) Nag. 236=72 I. C. 473; *Bhadrappa v. Jaggaraju*, (1926) Mad. 177.

2. *Subbarama v. Nagammal*, (1901) 24 Mad. 683; *Coventry v. Tulshi*, (1904) 31 Cal. 822; *Murlidhar v. Narasingh*, (1911) 15 C.L.J. 453=10 I.C. 359; *Narayana v. Singaravelu*, (1917) 33 M.L.J. 543=42 I.C. 282; *Ramalinga v. Sheik Ibrahim*, (1920) 12 L.W. 34=59 I.C. 161; *Dambar Singh v. Kalyan Singh*, (1922) 44 All. 350; *Rajita Ginpathy v. Bhavanisankaran*, (1924) 47 Mad. 641; *Keshawerindra v. Debendra Bale*, (1919) Pat. 121=48 I.C. 245; *Palancheri Govinda Menon v. Krishna*, (1923) Mad. 649=12 I.C. 397.

3. *Mul Raj v. Kishon Lal*, (1926) 94 I.C. 172.

4. *Ghulam v. Narain*, (1901) A.W.N. 32. But see *Viyathan Sridevi v. Neelakantha*, (1907) 17 M.L.J. 311.

5. *Alayakkammal v. Arunachala*, (1901) 12 M.L.J. 97; *Beniram v. Nanhee*, (1885) 7 All. 102 P.C.

6. *Collector of Shajahanpur v. Kuni Behari*, (1909) 32 All. 210. See *Behari v. Mukat Singh*, (1906) 3 A.L.J. 140.

7. *Baijnath v. Hari Prasad*, (1924) Pat. 628.

8. *Vuppuluri Somasundaram v. Kondayya*, (1926) Mad. 12=49 M.L.J. 401; *Mukat Singh v. Misra Parasram*, (1924) All. 726.

9. *Makund v. Saraswati*, (1919) 29 C.L.J. 245=51 I.C. 98.

Instances of
orders final.

decided in the previous execution proceedings,¹ where in execution of a simple money decree obtained against her deceased husband, the widow objected that the property sought to be taken was in her possession by consent of her husband's heirs in lieu of her maintenance, but the objection was disallowed,² where on the death of a judgment-debtor the managing member of the family allowed execution to proceed against him for about a year without raising any objection as the legal representative of the judgment-debtor,³ when the application for execution was held to be maintainable,⁴ when on the application of a transferee of a decree notice was issued to show cause against arrest and arrest was ordered,⁵ when the liability for mesne profits and the rate of profits were decided,⁶ where at the instance of the judgment-debtor himself, a person had been brought on record as legal representative of the deceased decree holder,⁷ where an application to set aside sale on the ground of fraud or material irregularity or the like was rejected,⁸ where a certain item of costs was held not payable,⁹ where the application of the decree-holder for execution was returned on account of wrong calculation of the amount, though the notice was served on the judg-

1. *Sheik Budan v. Ramchandra*, (1887) 11 Bom. 537.

2. *Abadi v. Muhammad*, (1906) 3 A.L.J. 198.

3. *Coventry v. Tulshi Pershad*, (1904) 31 Cal. 822. See also *Jogendranath v. Hiranya Kumar*, (1904) 2 C.L.J. 499.

4. *Mahadeo v. Trimbak*, (1919) 21 Bom. L. R. 344=50 I.C. 972.

5. *Oman Prasad v. Jani Durlab*, (1914) 12 A.L.J. 206=23 I.C. 286; *Taysingh v. Jagan Lal*, (1916) 38 All. 289.

6. *Makund Singh v. Saraswati*, (1919) 29 C.L.J. 245=51 I.C. 98.

7. *Makund Lal v. Priyanath*, (1918) 45 I.C. 687.

8. *Jhara Biswas v. Amritamoyi*, (1917) 38 I.C. 47.

9. *Gopichand v. Lala Benarsi Das*, (1922) Lah. 361.

ment-debtor and the decree-holder did not take steps to reverse the order,¹ *the orders were held to be final.* Instances of orders final.

A certificate of sale granted by a presiding Judge cannot, so long as the order granting the certificate stands unreversed, be questioned by his successor in office.² Where upon objection to the application for execution, an order was made directing the properties affected by the decree to be sold in a certain order, the same question cannot be reopened in a subsequent application for the execution of the same decree.³ Where an application for execution was returned and the decree-holder was directed to reduce the amount claimed by him and the applicant failed to appeal from that order, it was held that the order was binding on him although it was made without notice to the opposite party and that the decree-holder could not afterwards claim a larger amount.⁴ In execution of a decree in favour of D against J certain persons alleging that D was benamidar for them applied for execution and notices were issued to J to which he did not appear in Court. A subsequent order framed was also made on notice to J but ex-parte. It was held on a further application that J could not go behind the order.⁵

Although a decree does not in terms give a certain relief, yet if it is construed in orders passed

1. *Vyapuri v. Chidambara*, (1914) 37 Mad. 314.

2. *Vithal v. Vithoji*, (1882) 6 Bom. 586.

3. *Murlidhar v. Goma*, (1910) 7 A.L.J. 401=5 I.C. 210; *Nageshar v. Srinivas*, (1891) A.W.N. 33.

4. *Vyapuri v. Chidambara*, (1914) 37 Mad. 314.

5. *Oman Prasad v. Durlab*, (1914) 12 A.L.J. 206=23 I.C. 286. See also *Behari Lal v. Majid Ali*, (1902) 24 All. 138; *Sheoraj v. Kameshar*, (1902) 24 All. 282.

Instances of
orders final.

upon it, as having given that relief, it is not competent to the Court on a subsequent application to treat those orders as erroneous and put another construction on the decree.¹ Where several applications for the execution of a maintenance decree were granted on the footing that properties were liable to be sold under it, after notice to the judgment-debtor, the judgment-debtor is precluded in a later application from contending that the decree did not authorise the sale.²

Instances of
orders not
final.

It is immaterial if the prior order be erroneous.³

When the judgment-debtor was not a party to the previous order,⁴ when a contention, on limitation⁵ or maintainability,⁶ or right to sell,⁷ was not finally decided, when a petition of objection against execution was dismissed for default,⁸ *there is no final order.*

1. *Venkata Narasimha v. Papamma*, (1895) 19 Mad. 54; *Subbarama v. Nagammal*, (1901) 24 Mad. 683; *Ram Kripal v. Rup Kuari*, (1883) 6 All. 269 P.C.; *Ramasami v. Rangamannar*, (1914) 26 M.L.J. 255 = 23 I.C. 390; *Venkatamma v. Manikkam*, (1914) 16 M.L.T. 399 = 26 I.C. 244.

2. *Kondama Naidu v. Venkatalakshmi*, (1911) 10 I.C. 632. See also *Surendranath v. Bolaram*, (1918) 45 I.C. 699.

3. *Deputy Commissioner, Gonda v. Bhagwan*, (1909) 12 O.C. 124 = 2 I.C. 297; *Sheeraj v. Kameshur*, (1902) 24 All. 282 (Limitation); *Gunessar v. Gonesh*, (1898) 25 Cal. 789; *Mungul v. Girija Kant*, (1882) 8 Cal. 51 P.C.; *Shib Lal v. Peare Lal*, (1889) 9 A.W.N. 163; *Shafaat Begam v. Harmat*, (1895) 16 A.W.N. 15; *Nageshar Prasad v. Srinivas*, (1891) 11 A.W.N. 33; *Sheo Sahai v. Najaf Khan*, (1882) 2 A.W.N. 128; *Kali Charan v. Sharaf Ali*, (1884) 4 A.W.N. 39; *Ghulam Muhammad v. Narain Das*, (1901) 21 A.W.N. 32; *Muhammad Husain v. Mozaffar Hussain*, (1905) 25 A.W.N. 237.

4. *Sitanath v. Rani Kunak*, (1923) Cal. 322 = 67 I.C. 879.

5. *Kandaswamy v. Maruda Pillay*, (1924) Mad. 145 = 76 I.C. 761.

6. *Vitoba v. Tejiram*, (1912) 14 Bom. L. R. 264 = 14 I.C. 977. See also *Balkrishna v. Shiva China*, (1911) 35 Bom. 245.

7. *Ishan Chandra v. Dulal Chandra*, (1918) 44 I.C. 220.

8. *Govinda Chandra v. Kailash Chandra*, (1918) 45 Cal. 530.

Where a decree was transferred to another Court for execution and the judgment-debtor in setting aside an attachment made by such Court did not raise the plea of limitation as far to the execution of the decree, it was held that he was not prevented from raising it before the Court that passed the decree upon his subsequent application to that Court.¹

A judgment-debtor cannot be allowed to raise a plea which he might and ought to have taken when notice under section 248 (Or. 21, rule 22) was issued to him to show cause why the decree should not be executed.² So where the holder of a decree against the mortgagee attached the mortgage decree before its execution, got himself substituted in place of the mortgagee-decree-holder sold the property in execution and the judgment-debtor did not object to the substitution, but only pleaded payment to the substituted decree-holder the substitution of the decree-holder was only an irregularity and could not be raised in later proceedings, because such irregularity did not affect the jurisdiction of the Court.³

But a notice to the judgment-debtor without specifying the specific relief prayed for will not render the order made on it *res judicata*,⁴ and where

1. *Srihury v. Murari*, (1886) 13 Cal. 257.

2. *Murlidhar v. Narsingh*, (1911) 17 C.W.N. 113=10 C.L.J. 453=10 I.C. 359; *Fazar v. Uzir Ali*, (1909) 1 I.C. 284; *Taj Singh v. Jagan Lal*, (1916) 38 All. 289; *Dorayya v. Verreyya*, (1918) 35 M.L.J. 312=44 I.C. 4. See also *Inayat v. Sadik*, (1920) 56 I.C. 251; *Appasami v. Sundaram*, (1910) 7 M.L.T. 224=6 I.C. 283; *Wahdumal v. Tharo*, (1909) 4 I.C. 478; *Brajlal v. Atkinson*, (1901) 5 Pat. L.J. 639=57 I.C. 707.

3. *Jogendranath v. Hiranya Kumar*, (1905) 2 C.L.J. 499;

4. *Chokalingam v. Madura Meenatchi*, (1909) 5 M.L.T. 293=4 I.C. 1141.

a notice issued under section 248 C.P.C. 1882, was not personally served upon the judgment-debtor and he was not otherwise appraised of such notice with the result that he came to know of the execution proceedings for the first time when his moveables were attached and he preferred objection to execution soon after, the principle of *res judicata* is inapplicable.¹ The mere issue of a notice under section 248 C.P.C. not followed by any order for execution or by any act of the Court such as attachment of property in furtherance of execution, cannot be construed as an adjudication by the Court that the application is not barred by limitation.²

Judgment-debtor and estoppel.

Where a person on his own application was joined as a respondent in an appeal but failed to take any steps by way of defence on the suit having been remanded for re-trial on the merits, whereas if he had chosen to do so, he could have filed a written statement raising any defence, which he had or thought he had, it was held not open to him to raise, on the plaintiff proceeding to execute his decree, such objection as he could have raised by way of defence to the suit itself because this would fall within the principle of the explanation of section 13 of the Code of 1882 and "although section 13 might not in terms apply by reason of the matter not having been decided in another suit, still the principle of law underlying section 13 had to be applied to proceedings in execution of decrees."³

1. *Mochai Mandal v. Meseruddin*, (1911) 13 C.L.J. 26=9 I.C. 213.

2. *Khisal v. Ukiladdin*, (1909) 14 C.W.N. 114=3 I.C. 47.

3. *Kishan Sahai v. Aladad*, (1891) 14 All. 64. See also *Behari Lal v. Majid*, (1897) 24 All. 138; *Basdu v. Juthan*, (1905) 27 All. 684; *Lawrence Philips & Co. v. Nazarath*, (1924) 78 I.C. 806; *National Bank of Upper India Ltd. v. Gopal Das*, (1924) Oudh 434=81 I.C. 651.

It is not always incompetent to a party to set up in execution proceedings a claim which might have been set up by him in the suit itself, but which he had omitted to raise by way of defence in the suit. Though the plea might have been set up as a ground of defence in the suit, yet where it was not one that ought to have been then raised by the party, his omission to have raised the plea in the suit itself would not bar him from setting up such claim anew in proceedings in execution.¹

Failure to raise defence in suit.

It is not however the law that a judgment-debtor who puts forward objections in the execution department must put forward all possible objections once for all and that if he does not do so matters which he has omitted must be treated as *res judicata* against him even if he was not aware of them. Unless a particular objection has been raised and decided the matter is not *res judicata* against the judgment-debtor by reason of the fact that he had a previous opportunity of raising the question but did not do so.² Nor is a defendant in a suit debarred by section 47, C. P. Code from raising a point in defence of his title even though he could have raised but did not raise it in former execution proceedings to which he was a party.³ Where an earlier application for execution was dismissed as barred by time and in a later application it was contended that execution was not barred by reason

Objection must have been decided.

1. *Atohayya v. Bangarayya*, (1892) 16 Mad. 117.

2. *Kalian v. Jagan Prasad*, (1916) 13 A. L. J. 162=27 I. C. 950.

3. *Chandramoni v. Halijennessa*, (1908) 9 C.L.J. 464=4 I. C. 168. See also *Durga Charan v. Karanat Khal*, (1903) 7 C. W. N. 607. *Lakshmi Kuttiamma v. Marithumma*, (1925) Mad. 127=47 M.L.J. 798.

of certain earlier applications and acknowledgments the Court said that in the earlier application there was no adjudication that the execution of the decree was barred but only that the application was not shown to be in time and to that extent only the adjudication was binding on the parties. The doctrine of *res judicata* in execution proceedings cannot be carried further so as to make the adjudication equivalent to an adjudication that the other applications and acknowledgements relied upon were not sufficient to save limitation.¹ Where a decree was passed for possession of land and mesne profits and the decree-holder applied for execution in respect of both the reliefs, and the Court ordered delivery of possession and made no reference to the other relief asked for, the same did not bar a subsequent application for realisation of profits under the decree.² Where a judgment-debtor objected to an attachment of certain property but by mistake omitted to mention in his objection certain houses, in respect of which he filed another objection, it was held that the judgment-debtor could make the second objection and that section 13 or 43 C. P. C. 1882 was no bar to it.³

Substantive
rights must
be decided.

It is only where substantive rights are decided in an order in execution, such decision is *res judicata* in subsequent execution proceedings. But when the decision on the prior application was one on a question of procedure as it then stood it does ~~not~~ operate as *res judicata* when that procedure itself is changed by statute.⁴ Where

1. *Mahadeo v. Trimbakhat*, (1919), 21 Bom. L. R. 344=50 I. C. 972. See *Kalian Singh v. Jagan Prasad*, (1915) 13 A. L. J. 162=27 I. C. 950.

2. *Nityananda v. Gajapati*, (1901) 24 Mad. 681.

3. *Har Prasad v. Ratha Krishnan*, (1909) 2 I. C. 105.

4. *Varadaraja v. Murugesu*, (1915) 39 Mad. 923.

a decree-holder having put up certain properties of the judgment-debtor to sale in execution of his decree, bid for Rs. 600 for it but failed to deposit the earnest money and then applied to withdraw the execution ; and the Court, being of opinion that this was a dodge to avoid paying the earnest money, allowed the application, but subject to the condition that the same properties should be put up for sale, first at the next application for execution and decree-holder must bid for Rs. 600 for it. It was held that that the order was not binding on the decree-holder so as to preclude him from proceeding to execute the decree against the other properties of the judgment-debtor, and the court have no power to make such an order, it did not operate as *res judicata*.¹ Similarly when the Court refused to confirm an auction sale in consequence of the failure of the decree-holder to produce the receipt as ordered and directed also that the decree-holders should not have power further to execute their decree, but on a subsequent application the Court ordered sale, it was objected that the prohibition under the previous order operated as *res judicata*. It was held that the order thus relied upon was superfluous and not warranted by any issue then before the Court and did not operate as *res judicata* as to the right of the decree-holders to execute their decree.²

An application for the execution of a decree when the applicant was not upon the record when judgment was given nor when the decree was made, but subsequently to both, would not by itself make the applicant a party to the suit and a decision by such Court on an issue as to such applicant's legiti-

1. *Jnanuda v. Nokuleswar*, (1906) 11 C.W.N. 236.

2. *Natthu Ram v. Muhammad Ali Kan*, (1895) A.W.N. 119.

macy and since it was made without jurisdiction, was held not to be a bar under section 2 C. P. C. 1859 to a regular suit later on in which the said applicant's legitimacy is again put in issue.¹ In a petition for the execution of a decree for maintenance an erroneous decision on a point of law does not operate as *res judicata*, so as to bar a subsequent application to recover arrears of maintenance accrued due after the first application.² Where a judgment-debtor did not take exception to the amount set forth as being due on the decree in an application for execution, he was not prevented by the rule of *res judicata* from afterwards raising the question.³

Constructive
Res judicata.

The principle of implied or constructive *res judicata* is not necessarily applicable to execution-proceedings.⁴ Where the grounds relied upon by the decree-holder as saving limitation in respect of the subsequent application have not been adjudicated upon in the previous execution proceedings,⁵ where a judgment-debtor did not take exception to the amount set forth as being due on the decree in

1. *Abidunissa v. Amirunissa*, (1876) 2 Cal. 327 P. O. See also *Fakharooddeen v. Pogose*, (1878) 4 Cal. 209.

2. *Sitama v. Narayana*, (1916) 30 Mad. 504. See also *Palniappa v. Savari*, (1908) 18 M.L.J. 548.

3. *Kalyan v. Jagan*, (1915) 37 All. 539; *Rattan Lal v. Biba Kunria*, (1916) 34 I.C. 144.

4. *Somasundaram v. Chokkalinga*, (1917) 40 Mad. 780; *Subramania Aiyar v. Rajeshwara*, (1917) 40 Mad. 1016; *Shao Mangal v. Mt. Hulsa*, (1922) 44 All. 159. See *Mydeen v. Md. Abdul Gaffer*, (1919) 10 L.W. 565=53 I.C. 862; *Debli and London Bank v. Ramrattan*, (1916) 2 O.L.J. 611=32 I.C. 754; *Lakshmikutti-amma v. Mariathumma*, (1925) Mad. 127=47 M.L.J. 798. See however *Janki Kuer v. Banwamala Ramanuja Jeer*, (1924) 3 Pat. L.W. 218=45 I.C. 404; *Rameswar v. Keshwar*, (1917) 47 I.C. 700.

5. *Mahadeo v. Trimbak*, (1919) 21 Bom. L.R. 344=50 I.C. 972.

an application for execution,¹ where the previous application was for recognition of transfer and for transmission of the decree, and in the later application the judgment-debtors objected to the mode of execution,² where the question in the previous execution proceedings was about the reopening of a partition and the subsequent application was for division of the same properties³ then was no res judicata.

An order in execution proceedings may bar the trial of the same question between the parties in a subsequent suit.⁴ Where in execution of a decree, the judgment-debtor alleged a payment and it was on inquiry found to be and also,⁵ when the executing Court decided that the lands attached in execution were saleable⁶ when the widow's objection to delivery of property on the ground of her right to residence was negatived and she instituted a suit to declare her right to reside and for maintenance,⁷ when the judgment-debtor's property was held liable or not liable to attachment,⁸ the same question cannot be raised in a subsequent suit between the parties.

Bar of
subsequent
suit.

1. *Kalyan Singh v. Jagan Prasad*, (1915) 37 All. 589; *Rattan Lal v. Biba Kunria*, (1916) 34 I.C. 144.

2. *Natesa Chettiar v. Annamalai Chettiar*, (1923) Mad. 487 = 73 I.C. 213.

3. *Poduru Lakshmi Narayana v. Ponnada Pallamraju*, (1916) 4 L.W. 101 = 37 I.C. 354.

4. *Nga Po Tun v. Mi Thon Pon*, (1910) 1 U.B.R. 66 = 10 I.C. 991.

5. *Abdullah v. Kanhaya*, (1913) P.R. 91 = 14 I.C. 751.

6. *Kashinath v. Dhondshet*, (1916) 40 Bom. 675.

7. *Bhagwan Kuar v. Harnam Kuar*, (1915) P.L.R. 69 = 26 I.C. 430.

8. *Vithoba v. Tejiran*, (1912) 14 Bom. L.R. 264; = 14 I.C. 977; *Jaburans v. Ekram Kai*, (1918) 4 Pat. L.W. 279 = 44 I.C. 654.

Estoppel *in pais*.

Carr v. London and N. W. Ry. Co.

The law of estoppel *in pais* in its modern forms is stated in the Indian Evidence Act.¹ Under Section 115 "Where one person has, by his declaration Act or Commission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." In the case of *Carr v. London and N.W.Ry. Co.*,² the following propositions on estoppel *in pais* were laid down. (a) "If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such a state of things and acts upon such belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things does not in fact exist³; (b) If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way and it be acted upon that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of things.⁴ (c) If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act upon it in a particular way and he with such belief does act in that way to

1. Act of 1872, s. 115.

2. (1875) 10 C. P. 307.

3. *Munoo Lall v. Lalla*, (1873) 21 W.R. 21.

4. See *Madhub v. Law*, (1874) 13 B.L.R. 394.

his damage, the first is estopped from denying that the facts were represented.¹ (d) If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result and such culpable negligence has been the approximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first, to show that the state of facts referred to did not exist."²

Summary of the rules.

Estoppel is purely a personal bar operating against the person whose conduct constitutes it and against his privies and representatives. The simple fact of purchase at an execution-sale will not make the purchaser the representative of the judgment-debtor within the meaning of section 115 of the Evidence Act. On the contrary the execution-purchaser derives his title by operation of law adversely to the judgment-debtor. The title of a judgment-creditor or an auction-purchaser cannot be put on the same footing as the title of a mortgagee or of a person claiming under a voluntary alienation for the mortgagor. The possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor.³ This opinion was found to have been

Estoppel is a personal bar.

1. See *Sarat Chunder v. Gopal Chunder*, (1892) 20 Cal. 296 P.C.; *Syed Murad v. Sheo Bahai*, (1892) 19 I.A. 211; *Manikram v. Ram Aot*, (1915) 27 I.C. 611. But not when the person is under no duty to speak; *Kanchan v. Kamala*, (1915) 21 C.L.J. 441=29 I.C. 734.

2. See *McLaren v. Verschoyle*, (1901) 6 C.W.N. 229.

3. *Lala Parbhu v. Mylne*, (1887) 14 Cal. 401; *Bashi Chunder v. Enayat*, (1892) 20 Cal. 236; *Gour v. Hem Chunder*, (1892) 16 Cal. 355; *Rungo v. Raj Coomaree*, (1886) 6 W.R. 197; *Musst. Imrit v. Dulla*, (1872) 18 W.R. 200; *Ali Saheb v. Kaji Ahmed*, (1891)

based on a mis-apprehension of views¹ expressed by the Privy Council on the distinction between a sale in execution of a decree and a sale in satisfaction of the decree,² for though a purchaser at an execution sale is a representative of the judgment-debtor within the meaning of Section 47 C. P. Code, it does not necessarily follow that he is not barred by the same rule of estoppel as the judgment-debtor on the principle that the former has purchased merely the right, title and interest of the latter,³ and consequently does not occupy a position of greater advantage.⁴

Auction-
purchaser and
estoppel.

A purchaser at a court-sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of the sale and represents the execution creditor in so far as he had a right to bring such a right title and interest to sale in satisfaction of his decree.⁵ Where a plea of estoppel is available to the decree-holder it is likewise available to the purchaser at the execution sale.⁶ He may take

16 Bom. 197 ; *Vasarji v. Lallu*, (1885) 9 Bom. 285 ; *Gajanan v. Nilo*, (1904) 6 Bom. L.R. 864.

1. *Srimati Anandamoyi v. Dhanendra*, (1871) 8 B.L.R. 122 P.C. ; *Tarakchandra v. Baikantrath*, (1880) 7 Cal. 107 P.C.

2. *Ishan Chunder v. Beni Madhub*, (1896) 24 Cal. 62 F.B.

3. *Dorab v. Abdool*, (1878) 5 I.A. 116 ; *Sundara v. Venkata-varada*, (1893) 17 Mad. 228 ; *Rajah of Deo v. Abdullah*, (1918) 45 Cal. 909 ; *Kalidas v. Prasanna Kumar*, (1919) 24 C.W.N. 269=55 I.C. 599.

4. *Mahomed v. Keshori*, (1895) 22 Cal. 909 P.C. ; *Ishan Chunder v. Beni Madhub*, (1896) 24 Cal. 76 ; *Ram Coomar v. Macqueen*, 18 W.R. 166 P.C. ; *Unopoorna v. Nufar*, (1874) 12 W.R. 148 ; *Gulzari v. Madho*, (1904) 1 A.L.J. 65 F.B.

5. *Krishna Bhupati v. Vikrama*, (1894) 18 Mad. 13.

6. *Krishna Bhupati v. Vikrama*, (1894) 18 Mad. 13. *Sarat Chunder v. Gopal Chunder*, (1893) 20 Cal. 296 P. C ; *Swaminatha v. Dharmalinga*, (1917) M.W.N. 88.

advantage of an estoppel arising from the deed by which the debtor acquired title and is in his turn estopped by the deed made by the debtor before the sale; in other words, the buying creditor is bound by an estoppel against the debtor as grantor.¹ He is not bound by findings of Court as to genuineness of documents in a suit to which the defendant but not the purchaser was a party.²

If an auction-purchaser does not question the acts of his predecessor within 12 years he will be estopped from objecting to them on the ground of acquiescence.³ If a judgment-debtor does not take appropriate proceedings to get an illegal sale set aside, his transferee is bound by the same estoppel and cannot question the sale.⁴

Delay and acquiescence.

Attestation by itself is not sufficient proof of knowledge of the contents and does not impart necessarily assent to all the recitals therein.⁵ To act as estoppel it must be shown by the party pleading the estoppel that the action of attestation was a wanton deception.⁶ Where the auction-purchaser allows another to remain in possession for a long time and attests a sale deed by him his conduct

1. *Debendranath v. Mirzabdul*, (1909) 10 C.L.J. 150=1 I.C. 264; *Prayag v. Sidhu Prasad*, (1908) 35 Cal. 877; *Radha Kanta v. Ramananda*, (1912) 39 Cal. 513. *Pradyot Kumar v. Isri Ram*, (1912) 16 I.C. 792; *Kanchan Mandar v. Kamala Prasad Chowdhry*, (1915) 21 C.L.J. 441=29 I.C. 734. See *Joogul Kishore v. Khaja*, (1860) 4 W.R. Act X Rule 6; *Gajanan v. Nilo*, (1904) 6 Bom. L.R. 864.

2. *In re Palampadiyan*, (1910) 9 M.L.T. 207=8 I.C. 846.

3. *Sibdyal v. Goura Rao*, (1872) 18 W.R. 281.

4. *Hiwa Mal v. Karunamoy*, (1912) 15 I.C. 542.

5. *Raj Lukhee Dabea v. Gokool Chander Chowdry*, (1869) 13 M.I.A. 209; *Ram Chunder Poddar v. Hari Das Sen*, (1883) 9 Cal. 463.

6. *Maung Tha v. Maung Shwe*, (1911) 12 I.C. 891; *Basso v. Mir Muhammad*, (1913) 20 I.C. 291.

estops him from claiming the benefit under section 317 of C. P. Code.¹

Purchase
subject to
mortgage.

If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale in invitum and undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made the purchase. Where however the purchaser merely buys an estate which is under mortgage but does not take it subject to the encumbrance or undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes depends on the question whether the property has been sold subject to the mortgage or whether mere notice of the alleged mortgage was given in the proclamation of sale. The former contingency is provided for by Order 21, rule 62 and the latter is contemplated by Order 21 rule 66 of the C. P. Code, 1908.² If a person purchases the interest of a mortgagor he is as much bound as the mortgagor himself not to dispute the validity of the mortgage.³ Where property purchased in execution of a money decree was subject to a mortgage but not a mortgage executed by the judgment-debtor, although he could have been estopped from denying liability under the mortgage on account of his conduct in the mortgage transaction, the purchaser was held bound equally with

1. *Kandasami v. Rangasami*, (1912) 23 M.L.J. 301=16 I.C. 30.

2. *Kalidas v. Prasanna Kumar*, (1919) 47 Cal. 466. See also *Ganesh v. Bisram*, (1913) 18 I. C. 461.

3. *Debendranath v. Mirza Abdul*, (1909) 10 C. L. J. 150=I. C. 264; *Poreshnath v. Anathnath*, (1882) 9 Cal. 265 P. C. on appeal from (1878) 4 Cal. 783; *Kishory Mohan v. Mahomed*, (1890) 18 Cal. 1898, affirmed on appeal (1895) 22 Cal. 909 P. C.. See page 424 *et seq. supra*.

the judgment-debtor inasmuch as the interest of the latter had passed to him and his purchase was therefore subject to the mortgage.¹

Purchase
subject to
mortgage.

Where a person purchases property subject to a mortgage he is not by that sole fact estopped from disputing the validity of, or the consideration for the mortgage. But if the mortgagee has been induced to suffer some detriment or if he foregoes a portion of his money, then the purchaser may be estopped from disputing the mortgage.² When the plaintiffs purchased property of the judgment-debtor in the possession of a third person as mortgagee in execution and sued to set aside the mortgage as for fraudulent and collusive, it was held that the plaintiffs were not estopped, as the judgment-debtor might be, and there was nothing to prevent the judgment-debtor from benefiting by the chance of any claim upon the property even if he had himself to sue to procure it.³ An auction-purchaser at a sale in execution is not estopped from asserting, as against a person claiming to be a mortgagee prior to the sale of the property purchased, that in fact the property was his own, independent of the auction sale. At the most, his conduct in making the purchase could only be regarded as some evidence of an admission of title in the judgment-debtor which he could explain or rebut.⁴ Though after a purchase subject to a charge, the purchaser cannot deny the validity of the

1. *Prayag v. Sidhu*, (1908) 35 Cal. 877 ; *Kifayatulla v. Mahabir Prasad*, (1913) 1 O. L. J. 175=24 I. C. 2.

2. *Bala Preshad v. Sujan*, (1919) P. W. R. 28=49 I. C. 997. See also *Jairag v. Radhakrishna*, (1913) 35 All. 257 (where the mortgage was simply notified.)

3. *Ganesh v. Purushottam*, (1908) 33 Bom. 311.

4. *Pandit Hanuman v. Mufti*, (1875) 7 N. W. P. 145.

charge, he can contest the accuracy of the description of the charge in the sale proclamation. In any case a mistake in a sale proclamation can confer no greater right or benefit on the holder of the charge than is possessed by him under his own decree.¹ An auction-purchaser is not bound by a statement in the sale certificate as to the situation of the land purchased by him.² When the purchaser of the judgment-debtor's property in execution of a money decree paid off a prior encumbrance of 1896, he is not debarred from denying the genuineness of another mortgage of 1897, simply because he had acquired the portion of a prior encumbrance.³ Where a landlord in execution of a mortgage decree caused the sale of an occupancy holding and purchased it himself, he is not estopped from pleading non-transferability without his consent in a subsequent suit by the mortgagee of the occupancy holding.⁴

Doctrine does not rest on notice of duty.

The doctrine of estoppel does not rest absolutely upon any notice of duty on the part of the person sought to be estopped. The word 'omission' in section 115 of the Evidence Act need not be an omission to perform a duty implied by law. It is sufficient to raise an estoppel that a person, who has an interest in the property sought to be sold in execution of the decree and who has had an opportunity of having that interest proclaimed before the property is sold, has deliberately omitted

1. *Mahabir v. Anjumannissa*, (1919) 50 I. C. 145.

2. *Purgan v. Dhanpat*, (1919) 52 I. C. 739.

3. *Shib Narain v. Baikunthanath*, (1913) 19 C. L. J. 200=20 I. C. 864.

4. *Asmatunnessa Khasim v. Harmora Lal Biswas*, (1908) 35 Cal. 904; (1904) 8 C.W.N. 365; *Kunja Behary v. Matu*, (1909) 1 I. C. 661.

to ask the Court to have it notified for the information of the auction-purchaser. Under Order 21 rule 66 C. P. Code if there is a duty on the decree-holder, there is also a duty on the judgment-debtor to put forward any claim which he has by way of encumbrance, and if he does not do it, he is estopped from setting it up afterwards as against the auction-purchaser.¹

If a creditor in execution of a money decree sells certain property as that of his judgment-debtor, he will be estopped from afterwards setting up, any claim against the purchaser of a previous mortgage, which had been created in his own favour, and of which he had given no notice to the purchaser at the time the property was sold, and in ignorance of which the purchaser bid for the property, and paid the full price. The principle holds good even in cases where the mortgage deed has been registered.² So A mortgagee who has the mortgaged property sold, in execution of a decree other than upon his mortgage, without disclosing his mortgage lien, is ever estopped from setting up the mortgage against the title of bonafide purchaser at an execution sale.³ But where

Decree-holder
and estoppel.

1. *Manikram v. Ram Aotor*, (1915) 27 I.C. 611; *Raja of Kalahasti v. Maharajah of Venkatagiri*, (1915) 38 Mad. 387; *Pran Singh v. Janardan Singh*, (1912) 14 C.L.J. 541=13 I.C. 307; *Chidambaram v. Kandasami*, (1923) 46 Mad. 768; *Rukmabhai v. Ramchandra*, (1925) Nag. 320=88 I.C. 831.

2. *Tukaram v. Ramachandra*, (1877) 1 Bom. 314; *Agarchand v. Rakhma*, (1888) 12 Bom. 678; *Jagannatha v. Gangireddi*, (1892) 15 Mad. 303; *Kasturi v. Venkatachelapathi*, (1892) 15 Mad. 412; *Atab Pramanik v. Arif Tarafdhar*, (1914) 19 C.L.J. 590; *Onkar v. Baijnath*, (1893) 7 C.P.L.R. 15; *Sadasheo Tamboli v. Mt. Kaireman*, (1889) 3 C.P.L.R. 15; *Bhagwandas v. Tarachand*, (1901) 14 C.P.L.R. 17; *Rani Ratan Kuar v. Ratin Lal Seth Mahesan*, (1906) 2 N.L.R. 106; *Kalidas v. Prasanna Kumar*, (1920) 47 Cal. 466; *Aziz v. Mohun*, (1909) 4 I.C. 891.

3. *Muhammad v. Shib Sahai*, (1894) 21 All. 309; *Mc Connel v.*

Decree-holder
and estoppel.

in an application for execution of a money decree, the decree-holder mentions that the property was subject to a mortgage held by him, but the proclamation omits it, and such omission was not due to any fraud, collusion, or misconduct, it was held that he was not estopped from putting forward his mortgage against the auction-purchaser.¹ Where the property is sold under a mortgage decree, the interest of the mortgagor as well as of the mortgagee passes to the purchaser. The mortgagee is completely estopped from disputing that such is the effect of the sale, so far as his interest is concerned, although the office may have only described the sale as one of the right, title, and interest of the mortgagor, for it is not the practice in India to require the mortgagee to convey to the purchaser, and the transfer must take place by way of estoppel.²

Where a purchaser buys at an execution sale, all that he need look to is the proclamation and possibly the decree. The proclamation is prepared by Court, from the information given mainly by the decree-holder, and if the decree-holder lets the advertisement be drawn up in a particular way, he cannot be allowed afterwards to repudiate it and say, that the purchaser, whose money he has taken bought something quite different from what was advertised for sale.³ Where a decree-holder by mistake put up to sale the same piece of land under different numbers on two different occasions, and

Mayer, (1876) 2 N.W.P. 315. See also *Aunath v. Bishtu*, (1879) 4 Cal. 783; affirmed on appeal (1882) 9 Cal. 265 P.C.; *Kalidas v. Prasanna Kumar*, (1919) 47 Cal. 466; *Maung Kyni v. Ma Pwa Me*, (1921) 64 I.C. 953.

1. *Ram Sarup v. Bharat*, (1921) 43 All. 703.

2. *Seshagiri v. Salvador*, (1881) 5 Bom. 5.

3. *Khirode v. Jankidas*, (1913) 20 I.C. 753. See page 418 *supra*.

purchased it himself on the first occasion, he is estopped from setting up his purchase so as to defeat the rights of the purchaser at the second sale.¹

Decree-holder
and estoppel.

Where a co-sharer purported to mortgage the whole property and not merely his moiety in it and before the final decree was passed on the mortgage, N purchased the interest of both the sharers and was brought on record before the final decree as the representative of the mortgagor, and the property was sold and purchased by the mortgagee, in a suit by the mortgagee to establish his title to the whole, he was not precluded from showing that the mortgagor had title only to a moiety and that was what passed under the court-sale and no more, unless he was misled by some representation on the part of N into believing that the mortgagor has full title.²

A conduct of waiver may preclude parties from asserting rights which they did not come in time to assert.³ When the holder of a mortgage decree, after exhausting the mortgaged properties, proceeds to sell other properties of the mortgagor, and the mortgagor does not on notice object to such proceeding and an order is made, he is estopped by his conduct from objecting to a subsequent execution, on the ground that no decree under section 90 of the Transfer of Property Act was passed.⁴

Waiver.

1. *Tinnappa v. Murugappa*, (1884) 7 Mad. 107.

2. *Kamalkumar v. Kalimeah*, (1911) 15 C.W.N. 572=9 I.C. 662.

3. *Janaki v. Kamalathammal*, (1873) 7 M.H.C.R. 263.

4. *Gunindra v. Baijnath*, (1903) 31 Cal. 370; *Madhusudan v. Kailash Chunder*, (1898) 2 C.W.N. 201. (In this case the executing Court was the Court competent to pass the decree and the order for execution was held to be a decree under section 90 of the Transfer of Property Act.)

Waiver.

A person will be precluded by his conduct from objecting to an irregularity in procedure which he himself invites.¹ When an order for sale of mortgaged property was made under section 89 of Transfer of Property Act during the lifetime of the mortgagor, it is not open to his legal representative in a subsequent proceeding in respect of the same decree to contend that there is in fact no decree which can be executed.²

Proceedings in execution are in *invitum* as regards the judgment-debtor and he is in no way called upon to notice them and mere silence cannot operate as an estoppel. Where therefore, it was not suggested that the defendants took any part in the proceedings or stood by, so as to induce bidders to suppose that they claimed no interest other than as representatives of the judgment-debtor, or that their silence misled the bidders, the circumstance that the defendants refrained from setting up their title at the sale did not by itself estop them from impeaching the sale and asserting their own title.³ A party who does not raise objection to the proclamation which he ought to have raised, and thereby fails in a duty which he owes to the Court, should be held to be estopped from complaining of an irregularity, such as undervaluation resulting from an erroneous statement which he should have corrected.⁴ But this rule will not apply to cases

1. *Timmana v. Putobhata*, (1899) 1 Bom. L R, 90. See also *Akbar v. Alia*, (1902) 25 All. 137.

2. *Keshawesarindra v. Debendrabala*, (1919) 4 Pat. L.J. 213 = 48 I.C. 245.

3. *Gurupadapa v. Irapa*, (1890) 14 Bom. 558; *Kanchan v. Kamala*, (1915) 21 C. L. J. 441 = 29 I. C. 734.

4. *Siraminatha v. Sivagurunatha*, (1916) 32 I.C. 990. See also *Arunachellam v. Arunachellam*, (1889) 13 Mad. 19 P.C.; *Pran*

when the judgment-debtor was not aware of the facts to which he was bound to object and his failure to do so was due to a mistake for which he could not be to blame.¹ Waiver.

The waiver of a fresh proclamation on the part of the judgment-debtor for a fresh sale does not mean that he waives objection to an irregularity in non-specification of the hour of the day to which the sale is adjourned inasmuch as he has no control over the form of the order of the Court.² Similarly an application by the judgment-debtor for an adjournment of sale 'without issue of fresh proclamation and beat of drum' does not amount to a waiver preventing him to apply to set aside the sale held on the day adjourned on the ground that proclamation of sale was not affixed on each of the properties and consequently the sale fetched a low price, provided that when he presented this petition for adjournment he was ignorant of the fact that the proclamation had not been properly posted upon the various properties according to law, and such waiver does not amount to a waiver of any fraud practised upon the judgment-debtor.³ An erroneous statement made in a proclamation of sale signed by the decree-holder of the decretal amount due does not estop the decree-holder, unless the judgment-debtor has in any way been prejudiced by it.⁴

Singh v. Janardan, (1911) 14 C.L.J. 541=13 I.C. 337 ; *Debi Prosad v. Nagendra Kumar*, (1924) 78 I. C. 727.

1. *Raja of Kalahasti v. Maharaja of Venkatagiri*, (1915) 38 Mad. 387.

2. *Bhikari v. Rani Surjamoni*, (1902) 6 O.W.N. 48.

3. *Preo Lall v. Radhika Prasad*, (1902) 6 C. W. N. 42 ; *Dhanukdhari Singh v. Nathinia Sahu*, (1908) 6 C.L.J. 62.

4. *Srinivasa Rao v. Sama Rao*, (1911) 12 I.C. 97.

Waiver.

To petition for the postponement of a sale in execution of a decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed and occasions no estoppel.¹ Where in execution of a decree the judgment-debtor applied for extension of time to pay the amount, but his application was refused and the sale held, he is not estopped for contesting the validity of the sale on the ground of irregularity, because the terms on which he offered not to question the validity of the sale when applying for extension of time were not accepted by the Court.²

An undertaking not to appeal may create an estoppel.³ The withdrawal of an appeal creates a bar by estoppel, but it will not be so if the decree was a nullity and the appeal has therefore no decree to rest upon or to contend against.⁴ The fact that a judgment-debtor has voluntarily satisfied a decree does not estop him from appealing against the decree,⁵ for the decree is there until reversed and a judgment-debtor is bound in law to obey it, until it is set aside.

Inconsistent positions.

Persons will not be permitted to take up inconsistent positions.⁶ Where a defendant allowed

1. *Mina v. Juggul*, (1883) 10 Cal. 196 P.C.; *Musst. Oodey v. Musst. Ladoo*, (1870) 13 M.I.A. 585. See also *Mohundas v. Nilkomul*, (1894) 4 C.W.N. 283.

2. *Enamuddin Jamedhar v. Abdul Jaffar Duftri*, (1910) 5 I.C. 489.

3. *Moonshee Maharanee*, (1871) 14 M.I.A. 203; *Anantdas v. Ashburner & Co.*, (1876) 1 All. 67; *Protap v. Arathoon*, (1887) 8 Cal. 455; *Bahir v. Nobin*, (1901) 29 Cal. 306.

4. *Vishvanath v. Lallu*, (1909) 11 Bcm. L.R. 1070=4 I.C. 137.

5. *Mula Shah v. Kirpa*, (1888) P.R. 142.

6. *Musst. Efatoonissa v. Khandkar*, (1874) 21 W.R. 374; *Sonaollah v. Imamooddeen*, (1875) 24 W.R. 273; *Satyobhama v. Bal Krishna*, (1904) 29 Bom. 13.

without objection a purchaser of the plaintiff's interest in the suit to substitute his name on the record, he was estopped from contending that the suit had abated.¹ Where in execution of a decree, the defendant objected that the decree was not executable as it was and the decree was subsequently amended, it was not open to him to say that the decree was capable of execution before it was amended.² Where a person against whom execution is taken out admits liability on the decree holder giving up a portion of his claim, he cannot subsequently repudiate it.³ Where in an application to execute a decree, which provided for no interest, the decree-holders put in a prayer as to the award of interest and the judgment-debtor, accepting his liability to pay his decretal debt as well as interest, obtained from time to time adjournments from the Court to enable him to pay the amount, it was held that the judgment-debtor could not at a later stage dispute the interest and was bound to pay it from the date of admission.⁴ When in execution of a simple money decree, property was attached as belonging to the judgment-debtor, and after service of notice on his widow, the order for sale was passed and confirmed, it was held that the widow was precluded later on from raising a plea that the property had been given to her by her husband for her maintenance.⁵

Inconsistent
positions.

1. *Bir Chendra v. Bhansi*, (1869) 3 B.L.R. A.C. 214; *Manpal v. Sahib*, (1903) 27 All. 544 F.B.; *Kanshi v. Baddu*, (1906) P. L. R. 22.

2. *Mahomaya Prasad v. Abdul Hamid*, (1913) 18 C.W.N. 266=21 I.C. 615.

3. *Balbir v. Jugulkishore*, (1918) 3 Pat. L.J. 454=46 I.C. 473.

4. *Narayan v. Rasji*, (1904) 6 Bom. L.R. 417.

5. *Rukmabhai v. Ramchandra*, (1925) Nag. 320=88 I.C. 831.

Inconsistent
positions.

Where a judgment-debtor, who had appealed for reversal of an ex parte money decree against him, had consented to the attachment of an occupancy holding pending the re-hearing proceeding, and did subsequently on the decree being confirmed object to the sale on the ground of non-transferability, it was held that the consent to the attachment meant only the preservation of the property for the benefit of any possible purchaser and did not estop the judgment-debtor from objecting to the sale.¹ Where in a compromise of suit, the defendant filed a petition accepting personal liability but the decree did not contain such liability, the defendants were not estopped from disputing their personal liability in execution.²

A party will not be permitted to approbate and reprobate in the same matter.³ Where a person allowed execution to proceed for nearly a year without objection and twice obtained stay of sale to enable him to pay off the decree, and having approbated the execution proceedings by payment of part of the debt, induced the creditor to grant time for payment of the balance, he was estopped from saying later that the decree was incapable of execution.⁴ A landlord who withdraws the amount deposited by the transferee of a non-transferable holding to set aside its sale under section 310 of the Civil Procedure Code, 1882, without raising any objection, cannot plead subsequently that the transferee did

1. *Bochai v. Isri Jaji*, (1918) 5 P. L. W. 185 = 47 I. C. 29.

2. *Purshottam v. Keshosaran*, (1914) 24 I. C. 206.

3. See *Kristo v. Haromonee*, (1873) 1 I. A. 84; *Rupchand v. Serbeshwar*, (1906) 10 C. W. N. 748. See also *Vrajalal v. Bhaiji*, (1904) 6 Bom. L. R. 1103.

4. *Coventry v. Tulshi Preshad*, (1904) 31 Cal. 823.

not by his purchase acquire a valid title to the holding.¹

Inconsistent positions.

Where the property of the judgment-debtor is sold in execution of the decree, and the proceeds go in satisfaction of the decree, and the judgment-debtor accepts the payment of the decree, he cannot impeach a part of the sale.² Where the plaintiff had received payment of money due to him out of the proceeds of a sale of two shares to the defendant, he was estopped to seek to bring to sale one of the two shares in the defendant's possession even assuming that the plaintiff was in a position to show that one of the above two shares was the one undefined share mortgaged to him.³

Where the purchaser of the rights of two out of three brothers in an estate took two-thirds of the sale proceeds of a revenue sale, leaving the balance at the disposal of third brother, and a creditor of the latter took that balance out in 1904 without the plaintiff's objection, the plaintiff was debarred from claiming it three years later because by his conduct and by acquiescence he had rendered the withdrawal, though impeachable at the time, unimpeachable after the lapse of time.⁴

Where in a proceeding to set aside a sale, a judgment-debtor, with the consent of the decree-holder, filed a compromise agreeing to pay the amount before a certain date and binding himself not to contest the sale if he failed to pay the amount on the

1. *Thomas Barclay v. Syed Hussain Ali Khan*, (1908) 6 C.L.J. 601; *Gadadhar v. Midnapur Zamindar Co.*, (1918) 27 C.L.J. 385=43 I.C. 742; *Ramu v. Prakash*, (1916) 32 I.C. 757.

2. *Annapurnabai v. Ramachandra*, (1918) 43 I.C. 178.

3. *Jhinka v. Baldeo*, (1892) 14 All. 509.

4. *Haricharan v. Haridas*, (1913) 18 I.C. 805.

Inconsistent positions.

day fixed, it was held that it would be contrary to reason and equity that he should turn round and repudiate the agreement and the agreement estopped him from contesting the validity of the sale.¹

The Court of execution has the power to direct a refund of a sum levied under its order, subsequently reversed as without jurisdiction, and the decree-holder is estopped from saying that the Court had no jurisdiction to retrace its steps and to place the parties in the original position.²

On a decree being passed on a compromise, the judgment-debtor will be estopped from objecting to its execution. But where in execution of a consent decree the defendant objected that the remedy was by suit and not in execution and the objection was upheld, the defendant cannot be allowed to say in answer to a regular suit that the remedy was by execution and the suit would not lie.³

The terms of a decree cannot be altered nor can a proviso be waived at the will of a party. But where the Court passed an order accepting the terms of a compromise for payment of the decree-amount by instalments, and where after several payments were made according to it the balance was sought to be realised in execution, the defendant was estopped from contending that the terms of the compromise could not be enforced in execution;⁴

1. *Uattam Chandra v. Khetranath*, (1901) 29 Cal. 577 ; *Lakshmi Prasanna v. Rajnidar*, (1918) 47 I.C. 831.

2. *Govind v. Shakharam*, (1879) 3 Bom. 42. *Kashidas v. Ishan Chunder* (1904) 31 Cal. 914 P.C.

3. *Narasimha Rao v. Rama Rao*, (1895) 5 M.L.J. 79 ; *Hur Prashad v. Enayet*, (1876) 2 C.L.R. 471 ; *Basti v. Sajjad*, (1918) 47 I.C. 558=21 O.C. 188.

4. *Sri Ranga Bhupala v. Nayanim Bahadur*, (1912) 13 I.C. 81

and conversely where the decree-holder, received payment by instalments, he cannot be permitted to deny that the payment was irregular.¹

A decree altered by the agreement of parties with respect to the mode of payment and the interest payable cannot be executed as a decree and the acquiescence of the judgment-debtor in such execution cannot estop him from objecting to further execution of it.²

No declaration or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position and to do this he must both believe the facts stated or suggested by it and act upon such belief. In a sale of occupancy rights made with the Zamindar's consent, it cannot be said that the vendees were misled by such consent, for they must have known that sale was void. And unless it is shown that the purchase was made on the faith of the Zamindar's promise not to take action, the latter would not be estopped by his consent from questioning the validity of the sale.³ If a purchaser knew of the existence of a mortgage, though it was not disclosed in the proclamation, no estoppel can arise as against a mortgagee who seeks to enforce a mortgage against the purchaser.⁴ A purchaser at an execution sale of a holding, who proves that in the sale certificate granted to him the annual rent is described as Rs. 8/, does not

Representa-
tion and
belief in
estoppel.

1. *Dholimal v. Giansingha*, (1909) 3 S.L.R. 137=4 I.C. 479. For waiver in such cases, see Vol. I. 158 *supra*.

2. *Debi Rai v. Gokal*, (1881) 3 All. 585; *Ramalkhan Rai v. Bakhjour Rai*, (1884) 6 All. 623.

3. *Jhinguri v. Durga*, (1885) 7 All. 878 F.B.

4. *Nanakchand v. Chameli*, (1919) 17 A.L.J. 238=50 I. C. 777; *Jagannath v. Balkishun*, (1916) 1 Pat. L.J. 16=34 I.C. 375.

thereby establish the plea of estoppel that the landlord is not entitled to realise rent at a higher rate. To establish the estoppel, it is necessary to prove a statement anterior to his purchase, which may have influenced his conduct.¹ There can be no estoppel against an Act of Legislature.²

1. *Aman Ali v. Mir Hassain*, (1909) 10 C. L. J. 605=4 I. C. 739.

2. *Shridhar Balakrishna v. Babaji Mula*, (1914) 38 Bom. 709; *Chidambaram Chetti v. Vaidyalinga Padayachi*, (1915) 38 Mad. 519; *Jagadabhandu Saha v. Radha Krishna Pal*, (1909) 36 Cal. 920; *Telam Pramanik v. Adu Shaik*, (1913) 18 I. C. 791; *Sitarama Chetty v. Cottah Krishnaswami Chetti*, (1914) 24 I. C. 507; *Jogeswar Gorain v. Akhoy Ghose*, (1913) 19 C. L. J. 1=21 I.C. 926.

CHAPTER XXVI

Wrongful Execution

Irregular execution—Wrongful execution--Process before and after judgment—Summary remedy under the C. P. Code—Section creates special jurisdiction—Expense or injury—Sufficient cause—Scope of the remedy—Appeal—Alternative remedy by suit—Burden of proof—Execution after judgment—Wrongful arrest—*Fisher v. James Pearse*—Wrongful detention—General damages—Wrongful attachment—Cause of action—Damages—*Kishore Mohan Roy v. Harsukh Das*—Measure of damages—Defence—Limitation.

An execution is irregular where any of the requirements of the rules of the Court's practice have not been complied with and the proceedings will be set aside or amended or otherwise dealt with in such manner and upon such terms as the Court shall think fit.¹ Where an execution is irregular, whether it be set aside or not, the sheriff and his officer, and all persons acting under the sheriff are in general protected by the writ, provided it be not void on the face of it or did not issue from a Court without jurisdiction and provided that he or they do not give in the same plea with the party.² The title of a bona fide purchaser from the sheriff will be good though the execution be irregular, unless it was altogether void or the goods were the goods of a stranger and not of the judgment-debtor.³ In the latter case the owner may recover even against a bona fide purchaser for value.⁴

1. See R.S.C., O. 70, rule 1.

2. *Philips v. Biron*, (1772) 1 Stra. 509; *Hooper v. Lane*, (1847) 10 Q.B. 546.

3. *Doe d. Batten v. Murless*, (1817) 6 M. & S. 110; *Doe d. Emmett v. Thorn*, (1813) 1 M. & S. 425.

4. *Farrant v. Thompson*, (1822) 2 Dow. & Ry. (K.B.) 1; *Tancred v. Allgood*, (1859) 4 H. & N. 438.

Wrongful
execution.

An execution is wrongful,¹ where it is neither authorised nor justified by the writ of execution or by the judgment under which it is issued,² or where the writ is issued maliciously and without reasonable or probable cause. In the latter case, an action will lie for damages against the person at whose instance execution was levied. Where a plaintiff maliciously endorses on the writ a larger amount than is due,³ levies at a wrong address or on the goods of a person other than the judgment-debtor,⁴ seizes goods after the judgment-debt has been paid,⁵ or levies for a debt provable in bankruptcy on goods of a bankrupt who has obtained his discharge,⁶ or after he has become bound by composition proceedings or a scheme of an arrangement,⁷ or after stay has been ordered by the Court,⁸ or agreed upon between the parties,⁹ or where the writ is wilfully altered or a wrongful use made thereof,⁹ or against the goods of any ambassador or public minister of a

1. *Pinches v. Harvey*, (1841) 1 Q.B. 868; *Parry v. Great Ship Co.*, (1863) 4 B. & S. 556; *Barlett v. Stinton*, (1866) L.R. 1. C.P. 483.

2. *Gilding v. Eyre*, (1861) 10 C.B.N.S. 604; *Mellin v. Pedley*, (1879) 68 L.T. Jo. 134; *Woolley v. Morgan*, (1887) 4 T.L.R. 211.

3. *Morris v. Salbera*, (1889) 22 Q.B.D. 611 C.A.; *De Coppett v. Barnett*, (1901) 17 T.L.R. 273 C.A.; *Hilliard v. Hanson*, (1882) 21 Ch. D. 69 C.A.

4. *Clissold v. Cratchley*, (1910) 2 K.B. 244 C.A.; *Barker v. St. Quintin*, (1844) 12 M. & W. 441. Here no proof of malice is necessary; but in an action for levying whole amount after part-payment made, proof of malice and absence of probable cause must be proved; *De Medina v. Grove*, (1846) 10 Q.B. 152.

5. *Davis v. Shapley*, (1830) 1 B. & Ad. 54.

6. *Phillips v. General Omnibus Co.*, (1880) 50 L.J.Q.B. 112; *Seaton v. Deerpurth (Lord)*, (1895) 1 Q.B. 853 C.A.

7. *Winter v. Lightbound*, (1720), 1 Stra. 301; *Veal v. Warner*, (1669) 1 Mod. Rep. 20; *Bikker v. Beeston*, (1860) 29 L.J. Ex. 121.

8. *Hale v. Castleman*, (1746) 1 Wm. Bl. 2.

9. Diplomatic Privileges Act, 1708, 7 Ann. C. 12, S. 4; C.P. C., S. 86.

foreign State or prince,¹ the execution is wrong-
ful. Wrongful
execution.

Wrongful executions are not necessarily all void ab initio. If, for instance a sheriff does what he has no authority to do, for instance, breaks open the debtor's premises he will be liable for trespass, but the execution is good. An execution issued for the amount of the judgment, although that amount be more than actually due at the time, is not wrongful, so long as the judgment stands, and unless the judgment is first set aside no action will lie for issuing execution for that amount, even though it is alleged that the judgment was signed and execution issued maliciously and without reasonable and probable cause.

To put in force the process of the law maliciously and without any reasonable or probable cause is wrongful and if thereby another is prejudiced in property or person there is that conjunction of injury and loss which will lay the foundation of an action on the case.² A malicious arrest or attachment may be on mesne or on final process, but in order to maintain an action for this wrongful act, the plaintiff must show absence of probable cause or reason for the process,³ malice in instituting the former action,⁴ the fact of the execution of the process by the defendant and the determination of the former suit or proceeding in the plaintiff's

Process before
and after
judgment.

1. HALSBURY'S LAW OF ENGLAND, XIV. 28.

2. Per Lord Campbell C.J. in *Churchill v. Siggers*, (1854) 3 E.B. 937; *Layland v. Fancred*, 16 Q.B. 669.

3. See *Huntley v. Simpson*, 2 H. & N. 600; *Phillips v. Naylor*, 4 H. & N. 565. See *Dhurmo v. Shreemutty*, (1872) 18 W.R. 440.

4. See *Austin v. Debnam*, 3 B. & C. 139; *Whalle v. Pepper*, 7 Car. & P. 506.

favour, for till then it cannot appear whether the proceeding in question was groundless or not.¹

Summary
remedy under
the C. P.
Code.

Under section 95, C. P. Code, 1908,

“(1) *Where, in any suit in which arrest or attachment has been effected or a temporary injunction granted under the last preceding section,*

(a) *it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or*

(b) *the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense and injury caused to him :*

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) *An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.”*²

Section
creates special
jurisdiction.

This section creates a special jurisdiction in the Court trying a suit to award compensation as incidental relief and gives an alternative remedy and in no way interferes with the principles regulating suits for damages for abuse of Court's process. This section allows a limited remedy *without proof of malice*, which it is open to a party to avail him-

1. See *Watkins v. Lee*, 5 M. & W. 270; *Pierce v. Street*, 3 B. & Ad. 397.

2. The italicised words were introduced by the present Code. The section corresponds to section 491 and 497 of the C.P. Code, 1882.

self of, if he choose. In a *suit* for damages, the ordinary rule followed in cases of damages for malicious prosecution that the defendant would not be responsible unless he had acted with malice as well as want of reasonable and probable cause applies. If the object of the defendant in obtaining attachment before judgment be merely to put pressure on the plaintiff to pay his dues promptly and not to prevent any apprehended alienation by him, then the plaintiff is guilty of malice. If the object be the levying of black mail, the coercion of the accused in respect of some unconnected matter, the obtaining of compensation or restitution for the accused, that would amount to malice. Recklessness regarding the truth or otherwise of the allegations would also amount to malice. The attachment of a respectable man's property before judgment on the ground that he is attempting to alienate his properties with a view to defeat his judgment-creditor must in India damage his credit and regulation ; and it is immaterial that it is not proved that he was not affected in some specific manner. The defendant's means is no test of the measure of damages awardable to the plaintiff.¹

The words "expense or injury caused to the defendant" in this section are not confined to cases where special damage is shown or where the defendant has suffered some special injury to reputation or the humiliation caused of necessity by the arrest.²

Expense or injury.

To justify an attachment before judgment it is not enough that the defendant is in straightened circumstances, but it must be proved that he was

Sufficient cause.

1. *Manjappa v. Ganipathi*, (1911) 35 Mad. 598 ("special damage" discussed); *Kelarnath v. Bahari Lal*, (1925) 49 Bom. 629.

2. *Subraya Devay v. Venkatarama*, (1916) 3 L.W. 30=32 I.C. 592.

about to dispose of his property. If such proof is wanting there is no sufficient cause for the process.¹

Scope of the
remedy.

If a defendant is arrested before judgment, or his property is attached before judgment, he may apply though he has not been summoned² and even in a suit under the summary procedure, the defendant may claim compensation under this section and that claim may be a ground for grant of leave to defend.³

Under this section compensation can be granted only by the Court which disposes of the suit and only on the defendant's application.⁴ A counter-affidavit which traverses the plaintiff's allegation in support of the arrest and claims compensation is a sufficient application.⁵ A Provincial Small Cause Court has this jurisdiction.⁷

The order for payment of compensation is an independent order and the proper procedure is for the Court to make a separate order.⁸

Appeal.

Under the former Codes, there was no appeal from an order under this section; but now under section 104(f)⁹ an appeal lies.¹⁰ There is no second appeal.¹¹

1. *Narahari v. Vaithinatha*, (1919) 9 L.W. 69=49 I.C. 86.

2. *Syed Ali v. Adib*, (1890) 15 Bom. 160.

3. *Roulet v. Fetterle*, (1894) 18 Bom. 717.

4. *Hurro Soonduree v. Bungsee Mohun*, (1865) 3 W.R. Mis. 28.

5. *Ram Narain v. Kurun*, (1863) S.D. N.W. 136.

6. *Subraya Devay v. Venkatarama*, (1916) 3 L.W. 30=32 I.C. 592.

7. *Ibrati v. Sangaram*, (1902) 26 Mad. 504; *Karamwate Venkataswami v. Lanka Tripuriah*, (1915) 26 I.C. 359.

8. *Narasinga v. Govinda*, (1900) 24 Mad. 62; *Lok Nath v. Amir Singh*, (1905) 28 All. 81.

9. *Narahari v. Vaithinatha*, (1919) 9 L.W. 69=49 I.C. 86.

10. *Kannappa v. Sambasiva*, (1913) M.W.N. 897=21 I.C. 576; *C. V. C. T. Firm v. Sayi Bya*, (1911) 41 Bur. L.T. 204=11 I.C. 917.

11. *Kannappa v. Sambasiva*, (1913) M.W.N. 897=21 I.C. 576.

This section gives an alternative remedy and a suit still lies for compensation for wrongful arrest or attachment,¹ though if an application is made under this section and an order determining such application is made, it bars a suit in respect of the same cause of action. In construing the corresponding words of the section of the former C. P. Codes, viz, "an award of compensation, under this section shall bar," it was held that an unsuccessful application by the defendant did not bar a regular suit.² Under the expression of the present Code,³ "an order determining any such application shall bar," it appears the grant or refusal of the application is conclusive and will bar a regular suit. In *Albert Bonnan v. Imperial Tobacco Co. Ltd.*,³ it has been held that this section which allows limited damages (in the case of injunction) being obtained on insufficient grounds does not bar a suit for damages (for injunction) obtained in a suit instituted against the plaintiff maliciously and without reasonable and probable cause.

Alternative
remedy by
suit.

In the case of arrest or attachment on mesne process, as an arrest before judgment,⁴ the plaintiff should allege falsehood or fraud in obtaining the original order,⁵ and should show that there was malice and want of reasonable and probable cause,⁶

Burden of
proof.

1. *Wilson v. Kanhya Sahoo*, (1869) 11 W.R. 143; *Joy Kalee v. Chand Malla*, (1868) 9 W.R. 133; *Manjappa v. Ganapathi*, (1911) 35 Mad. 598.

2. *Daniel v. Mohun Bibee*, 1 Agra 104; *Nanda Kumar v. Gour Shankar*, (1870) 18 W.R. 305; *Goburdhun v. Banee Chunder*, (1874) 21 W.R. 375.

3. (1926) Cal. 757 = 94 I.C. 444.

4. C.P.C., O. 38, r. 1. For corresponding law, see (1838) 1 and 2 Vic. c. 110 and (1869) 32 and 33 Vic. c. 62.

5. *Daniels v. Fielding*, 16 M. & W. 206; *Ross v. Norman*, 5 Ex. 359.

6. *Dhurmo Narain v. Sreenutty*, (1872) 18 W.R. 440; *Chowdharee v. Dwarka Doss*, (1872) 4 A.H.C.R. 42.

and that the defendant has 'in some way misrepresented the facts or imposed on the judge in his representation of them.¹ If indeed a person briefly states certain facts to a judge, and the judge thereupon does an act which is erroneous and which the law will not justify, the party who made the statement is not liable, because in that case the grievance complained of arises not from the false statement of the party, but from the mistake of the judge; but this is not so, where the statement which put the Court in motion is maliciously false.²

Execution
after
judgment.

Process of execution on a judgment seeking to obtain satisfaction for the sum recoverable is of course *prima facie* lawful; and the judgment creditor cannot even be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied and that execution was sued out for a larger sum than remained due under the judgment. Without malice and the want of reasonable or probable cause the only remedy for a judgment-debtor thus aggrieved is to apply to the Court or a Judge that he may be discharged and that satisfaction may be entered up on payment of the balance justly due under the judgment. Where however the person of the debtor or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor *maliciously and without reasonable cause*, i.e., the creditor well knowing that the sum for which execution has been sued out is excessive and his motive being to oppress and injure the debtor—an action on the case will lie for this

1. *Gibbons v. Alison*, 3 C.B. 181.

2. *Farlie v. Eanks*, 4 E. & B. 499.

malicious injury¹; for here are present *damnum et injuria* giving a claim to redress and compensation.²

A suit to recover damages on account of injury caused by an arrest in accordance with a decree of a competent Court can only be maintained under special circumstances. The plaintiff must show (a) that the original action out of which the alleged injury arose was decided in her favour, (b) that the arrest was procured without reasonable and probable cause not merely out of malice, (c) that the injury sustained was something other than an injury which have been or might have been compensated for by an award of the costs of the suit *e.g.*, that he has suffered some collateral wrong. A judgment-creditor has the option of enforcing his decree against the person or property of the judgment-debtor and the fact that the decree is an *ex parte* one makes no difference.³ If a person has a reasonable and probable cause for asserting a legal right, he cannot be sued for setting the law in motion however vindictive may be his feelings towards his adversary. The Court is not warranted in inferring absence of probable cause from the fact that enmities and malice existed between the parties. What amounts to absence of such cause must be found on the facts as a matter of law.⁴ Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment.⁵

Wrongful
arrest.

1. *Churchill v. Siggers*, 3 E. & B. 929; *Gilding v. Eyer*, 10 C.B.N.S. 592 (603). See *Huffer v. Allen*, 2 Ex. 15; *Dimmarch v. Bowley*, 2 C.B.N.S. 542.

2. Broom's COMMENTARIES ON COMMON LAW, 740.

3. *Raj Chunder v. Shamasoondari*, (1879) 4 Cal. 583; *Wren v. Weild*, (1867) 38 L.J.Q.B. 327.

4. *Ibid.* *Wills v. Taylor*, 6 Bing. 186.

5. *Mahammad v. Secretary of State*, (1903) 30 Cal. 872 P.C.; *Bird v. Jones*, (1845) 7 Q.B. 742.

*Fisher v.
James Pearse.*

In *Fisher v. James Pearse*,¹ on the 27th June, 1883, the plaintiff was arrested by a bailiff of Small Cause Court at Bombay, under a writ of arrest for the amount of a decree obtained by the defendant on the 2nd May, 1883, against the plaintiff. On arrest the plaintiff informed the bailiff, that the money due under the decree had already been paid, as was the fact. The plaintiff could not produce the receipt of payment, and the bailiff refused to raise the arrest until payment was made. The plaintiff thereupon paid the money under protest, and was set at liberty. The mistake was subsequently discovered and the money was refunded to the plaintiff. It appeared that, prior to the plaintiff's arrest, the defendant's clerk had inquired of the Head Cashier of the Small Cause Court if the amount of the decree had been paid, but was told it was not, and a certificate of non-payment was issued. In conformity with the usual practice of the Court the chief clerk of the Court on receipt of the certificate issued the writ of arrest under the seal of the Small Cause Court, and the plaintiff was arrested. In March, 1884, the plaintiff presented a petition to the High Court for leave to sue as pauper, and claimed Rs. 25,000 from first defendant as damages for the wrongful arrest. When the petition came on for inquiry into the pauperism of the plaintiff, the presiding Judge was of opinion that it disclosed no cause of action and the plaint was returned to the plaintiff to be amended, but at the same time allowed to be filed. The plaintiff subsequently desired to add as party-defendants the Cashier and the Chief Clerk of the Small Cause Court, and on the 5th July, 1884, took out a

1. (1885) 9 Bom. 1.

summons calling upon the defendants to show cause why his amended plaint should not be received on the file of the Court in place of his first petition. It was contended for the Cashier and the Chief Clerk of the Small Cause Court that the suit against them was barred by limitation. It was held as regards the first defendant, that the plaint should be rejected as there was no bad faith, fault or irregularity on the part of the first defendant so as to make him responsible for the wrongful arrest; the plaintiff's imprisonment having taken place under a warrant of the Court issued in regular manner, and such Court being of competent jurisdiction, the plaintiff had no cause of action as against the first defendant the error was wholly and entirely the error of the officers of the Small Cause Court, also, as regards the Cashier and the Chief Clerk of the Small Cause Court that the plaintiff's suit was barred, as more than one year had elapsed from the date of the termination of the plaintiff's imprisonment.

*Fisher v.
James Pearse.*

An action may also lie for maliciously prolonging the detention of a prisoner who has become entitled to his discharge.¹

Wrongful
detention.

When a wrong person is arrested and imprisoned under a decree, to which he was no party, the person setting the Court in motion is not liable for such arrest and imprisonment, if he did not obtain the process fraudulently or improperly.²

In a claim for compensation for wrongful arrest before judgment, the Court may award general damages, though no proof any special damage is forthcoming.³

General
damages.

1. *Moore v. Gardner*, 16 M. & W. 595; *Magnay v. Burt*, 5 Q.B. 381; *Hounsfield v. Drury*, 11 Ad. & E. 98.

2. *Bheemacharlu v. Donti Murti*, (1875) 8 M.H.C.R. 38.

3. *Armugam v. Kadir Mohideen*, (1926) Mad. 962=97 I.C. 684

Wrongful
attachment.

The decree-holder, who wrongfully attaches the property of a person not a party to the suit, is liable in damages to that person,¹ although he may have acted unintentionally and in ignorance of the fact that it was not the property of the judgment-debtor.² The wrongful attachment is the direct act of the decree-holder and not of the officer of the Court and the decree-holder is the wrongdoer liable to make compensation.³

Cause of
action.

It is the seizure and not the detention that furnishes the basis of the suit,⁴ and with the seizure the cause of action is complete.⁵ Excessive attachment may give rise to a cause of action.⁶

In *Rama Ayya v. Govinda Pillai*,⁷ it was held that a mere procuring of an order for attachment before judgment did not afford a cause of action for damages. In *Nicholas v. Sivarama Ayyar*,⁸ in executing an order for attachment before judgment, the amin proceeded so far as to take out the plaintiff's cloths from the shelves of his shop and to measure them, when the plaintiff paid the amount and the warrant was returned to the Court with the defendant's endorsement that the claim had been settled.

1. *Syed Ruznuddeen v. Mt. Fuzalin*, (1865) 3 W. R. 120; *Kashee Chunder v. Seetal Chunder*, (1872) 17 W.R. 151.

2. *Kanaye Pershad, v. Hurchand*, (1870) 14 W.R. 120; *Murthappa v. Karanath*, (1911) 4 Bur. L.T. 220=12 I.C. 26; *Lebo v. Babulal*, (1925) Nag. 390; *Assan Mahomed v. Kadersa Rowther*, (1924) 2 Rang. 181; *Ramji Lal v. Ram Prasad*, (1926) Oudh 483=95 I.C. 443.

3. (1904) U.B.R. 2 Qr. C.P.C. 283.

4. *Na'goba v. Madholala*, (1908) 4 N.L.R. 49.

5. *Mahad v. Gokaldas*, (1878) 3 Bom. 74.

6. *Mahomed v. Hossein*, W.R. Mis. 24.

7. (1916) 39 Mad. 952; *Kedarnath v. Behari Lal*, (1925) 49 Bom. 629.

8. (1922) 45 Mad. 527.

In a suit for damages the learned judges said, "no Cause of
doubt, there was not, in our opinion, a completed action.
attachment by seizure of any of the plaintiff's
property but that is not material. For the claim,
as stated on the plaint, is generally in respect of
acts done and not expressly or exclusively in
respect of a completed attachment; and there is in
our opinion no doubt that the plaintiff may be
entitled to compensation even though the attach-
ment was not completed, if, not with standing
that he sustained injury by what was actually done,"
and as the defendant himself caused further pro-
ceedings in the suit to be dropped, it was not
necessary for the plaintiff to show that those
proceedings ended in his favour.

In *Kallumal v. Brown*,¹ a claim under section
278, C. P. Code, 1871 was dismissed for default and
the order had no conclusive effect, because there
was no investigation of the claim, and it was
therefore held that that claimant could sue the
decree-holder for damages for wrongful attachment
of his property without suing to establish his right
to the property. Seeing that under the C. P. Code,
1908, an order dismissing a claim default is also
a final order,² it would follow that until that is
set aside by a regular suit, the claimant cannot
obtain damages for wrongful attachment.

Damages may include costs incurred in the Damages.
proceedings for the removal of the attachment.³
They may be in the nature of a penalty as well
as of compensation.⁴

1. (1881) 3 All. 504.

2. See pages 298-9 *supra*.

3. (1904) U.B.R. 2nd Qr. C.P.C. 283.

4. *Velaet Ali v. Matadeen*, (1810) 13 W.R. 3.

*Kissorimohun
Roy v.
Harsukh
Das.*

In *Kissorimohun Roy v. Harsukh Das*,¹ the plaintiff's claim against attachment of his goods was disallowed and in a subsequent suit under section 283, C. P. Code, 1882, his right of property in the attached goods was established. The Judicial Committee held that in order to entitle the plaintiff to the full indemnity for the wrongful attachment, he was not bound to allege and prove that the defendants had resisted his previous application under section 278, maliciously or without probable cause, and that the goods having been sold under the Court's order, the difference in market value of the goods at the time of their attachment and their price when they were sold, the selling prices having fallen intermediately, must be added to the damages. Their Lordships said "The appellants mainly relied on the English case of *Walker v. Olding*,² which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order of goods illegally taken in execution in satisfaction of his debt. *Walker v. Olding*, would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the sheriff, an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants of attachment in security are issued on the *ex parte* application of the creditor who is bound to specify the property which he desires to

1. (1889) 17 Cal. 436 P.C.

2. 32 L.J. Ex. 142.

attach and its estimated value. In the present case, by the term of the perwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached, his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation, and delay and the consequences depreciation of the jute being the natural consequence of their unlawful act their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of attachment."¹

Measure of
damages.

When a creditor of an insolvent caused certain woollen goods belonging to the plaintiff to be attached by the receiver in insolvency, alleging them to be the property of the debtor and in spite of the plaintiff's objections contrived to keep the goods in the hands of the receiver for a considerable period and the goods were damaged by the ravages of insects, the plaintiff was entitled to compensation from the creditor, because the damage to the goods was the natural and probable consequence of the action taken and persisted in by the creditor.²

Where unthreshed rice belonging to a stranger was attached by the defendants as property of the judgment-debtor, and it was stolen by thieves while in the Nazir's custody, the defendants were liable for

1. See also *Bhushan Chandra v. Narendranath*, (1921) 32 C.L.J. 236=60 I.C. 280.

2. *Abdul Rahim v. Sital Prasad*, (1919) 41 All. 658; *Binda Prasad v. Ram Chandar*, (1921) 43 All. 452.

damages, the measure being the value of the rice on the day of the attachment.¹

Without proof of mala fides, a decree-holder is liable for damages for wrongful attachment in execution of his decree.²

Defence.

It is no defence to a claim for damages for wrongful attachment that the claimant might have released his property from attachment on furnishing security,³ or that the property was released on security,⁴ or that the attachment was raised after notice.⁵ But where property is attached before judgment and the suit finally dismissed, the attachment cannot be said to be illegal, if it was the defendant's property and the detention becomes wrongful when the suit is dismissed.⁶

Limitation.

Under Article 36 of the Indian Limitation Act, 1908, a suit "for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for" must be instituted within two years from the date when the malfeasance, misfeasance or nonfeasance takes place.

Under Article 39, a suit for compensation for trespass upon immoveable property must be insti-

1. *Gomad Mahad v. Gokaldas*, (1878) 3 Bom. 74; *Bishambhar Nath v. Gaddar*, (1910) 33 All. 306.

2. *Raynor v. Singheer Singh*, (1873) 5 N.W.P. 211; *Lobo v. Babulal*, (1925) Nag. 390. See also *Kishorimohan Roy v. Harsukh Das*, (1889) 17 Cal. 436 P.C.

3. *Valact Ali v. Matadeen*, (1870) 13 W.R. 3.

4. *Meherban v. Mt. Sheo Koonwar*, (1866) 1 Agra. 104. See also *Bhushan Chandra v. Narendranath*, (1921) 32 C.L.J. 236=60 I.C. 280.

5. *Narahari v. Vaithinatha*, (1919) 9 L.W. 69=49 I.C. 86.

6. *Manga v. Changa Mal*, (1925) All. 131=81 I.C. 1038.

tuted within three years from the date of the trespass.

Under Article 49, a suit for specific moveable. Art. 49.
property or for compensation for wrongfully taking or injuring or wrongfully detaining the same must be instituted within three years from the date when the property is wrongfully taken or injured or when the defendant's possession becomes unlawful.

Under Article 29, a suit for compensation for Art. 29.
wrongful 'seizure' of moveable property under legal process, is one year *from the date of the seizure*.¹ This Article is quite general in its terms and was intended to apply to all cases where an alleged wrongful seizure was made under legal process².

In *Arjan Biswas v. Abdul Biswas*,³ however, the Calcutta High Court said "when a seizure is under a writ of court it is *prima facie* not wrongful and unless it is shown that the Court issuing the writ had no jurisdiction over the subject-matter or that the writ was executed against a person not a party to the decree, a suit for compensation for seizure would not fall under Article 29." The seizure is intrinsically wrongful, when the property

1. *Mana Vikraman v. Avisilan Koya*, (1895) 19 Mad. 80; *Multan Chand v. Rank of Madras*, (1903) 27 Mad. 346; *Ram Narain v. Umrao Singh*, (1907) 29 All. 615; *Manga v. Changa Mal*, (1925) All. 131=81 I. C. 1038; *Ramaswamy v. Venkatarangiri*, (1911) 10 M.L.T. 381=12 I.C. 456 (It is enough if the plaintiff claims compensation on the footing of having some interest in the property attached, though not the owner).

2. (1908) 4 N.L.R. 49; *Murugesu v. Jattaram*, (1900) 23 Mad. 621; *Ram Narain v. Umrao Singh*, (1907) 29 All. 615; *Narasimha Rao v. Gangaraju*, (1908) 31 Mad. 431; *Mahalakshmi v. Basivi Reddi*, (1912) 14 I.C. 182.

3. (1921) 35 C.L.J. 480=64 I.C. 813.

of a third person is attached.¹ The seizure may be made without jurisdiction.² This view was taken by the Allahabad High Court.³ But a wider view was taken by the Madras High Court in *Sokkalingam v. Krishnaswamy*.⁴ There it is said that Article 29 is not restricted to cases in which seizure is intrinsically wrongful, as where it is made without jurisdiction; it applies also to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentation.⁵ It applies to a case where the plaintiff without being owner of the property, claims to be entitled to compensation on the basis that he has an interest in the property wrongfully seized.⁶ A suit for recovery of value of moveable property wrongfully seized and sold execution within this Article.⁷

Seizure.

The word 'seizure' implies the taking of something out of the possession of its owner.⁸ Unless there is actual seizure this Article will not apply.⁹

1. *Ram Narain v. Umarao Singh*, (1907) 29 All. 615; *Narasimha Rao v. Gangaraju*, (1908) 31 Mad. 431.

2. *Madras Steam Navigation Co. Ltd. v. Shalimas Works Ltd.*, (1915) 42 Cal. 85.

3. *Manga v. Changa Mal*, (1925) 81 I.C. 1038. See *Ram Narani v. Brij Bankey Lal*, (1917) 39 All. 322 where in the case of attachment of grain it was held neither under 29 nor Art. 36 applied.

4. (1920) 38 M.L.J. 326=55 I.C. 786. See *Mana Vikraman v. Avisilan Koya*, (1895) 19 Mad. 80, where Art. 49 was applied.

5. *Ramaswamy v. Venkatatanjeri*, (1917) 10 M.L.T. 381=12 I.C. 406.

6. *Maung Poon v. Maung Tu Nu*, (1911) 4 Bur. L.T. 46=9 I.C. 774.

7. *Ram Narain v. Umrao Singh*, (1907) 29 All. 615; *Multan Chand v. Bank of Madras*, (1903) 27 Mad. 346; *Narasimha Rao v. Gangaraju*, (1908) 31 Mad. 431.

8. *Ram Narain v. Brij Bankey Lal*, (1917) 39 All. 322. See also *Yellamal v. Aiyappa Naick*, (1914) 38 Mad. 912 *supra*.

9. As to what is 'seizure', see page 82 *supra*.

Where goods stored in a warehouse were attached by affixing a seal to the outer door of the warehouse without breaking open the door and actually taking possession of the goods, there was 'seizure' within the meaning of this Article.¹ Seizure.

Neither attachment of a debt nor payment in pursuance of such attachment constitutes seizure. The Article will not apply when the attachment was not by seizure but in any other mode, such as by a prohibitory order. In the latter case Article 36 was applied.² A suit to recover the amount paid to a decree-holder as debt attached is governed by Article 62 or Article 120.³

Under Article 29, limitation commences from the date of the seizure and such an attachment is not a continuing wrong within the meaning of section 23 of the Indian Limitation Act.⁴ In the case of an attachment by prohibitory order, where Article 36 was applied, it was thought to be a continuing wrong and time ran from the date of the removal of the attachment.⁵

Standing crops are not moveable property within the meaning of the Limitation Act,⁶ and a suit for damages for the wrongful attachment of Crops.

1. *Multan Chand v. Bank of Madras*, (1903) 27 Mad. 346.

2. *Surajmal v. Manekchand*, (1903) 6 Bom. L.R. 704; *Pandiri Veeranna v. Mandavilli Subbarao*, (1916) 31 M.L.J. 257=35 I.C. 98.

3. *Yellammal v. Ayyappa Naik*, (1914) 38 Mad. 972 F.B.; on appeal from (1912) 23 M.L.J. 579=16 I.C. 914.

4. *Ram Narain v. Umrao Singh*, (1907) 29 All. 612.

5. *Surajmal v. Manekchand*, (1903) 6 Bom. L.R. 704; per Sadasiva Iyer J. in *Pandiri Veeranna v. Mandavilli Subbarao*, (1916) 31 M.L.J. 257=35 I.C. 98.

6. See *Pandah Gazi v. Jennuddi*, (1879) 4 Cal. 665; *Sadu v. Sambhu*, (1882) 6 Bom. 592; *Narasimham v. Venkiah*, (1915) 31 I. C. 296; *Murlidhar v. Mula*, (1915) 11 N.L.R. 18=27 I.C. 935.

Crops.

crops is not governed by Article 29 or any other Article of the Schedule requiring the institution of a suit within one year of the seizure.

In *Venkataramarayanin v. Basavayya*,¹ the defendant illegally procured attachment of the plaintiff's land with crops on it and the attachment on the land was subsequently removed but not that on the crop. While under attachment part of the crop was lost by theft, part owing to negligence and failure to harvest in time and the rest was sold and the proceeds paid to the defendant. In a suit to recover the estimated value of the crops, it was held that the illegal attachment amounted to a trespass on immovable property and the suit being in substance one for damages consequent on such trespass Article 39 applied, the starting point being the date of attachment.¹

In *Surajmal v. Prahlad*,² the Nagpore Court conceded that standing crops are for the purposes of the Limitation Act immovable property and that illegal attachment of the standing crops is a trespass on immovable property, but held that a suit for compensation for illegal attachment of standing crops came within Article 29 only, because it specially provides for suits for compensation for such trespass and Article 36 only provides for suits for compensation for cases not provided for elsewhere. From a reading of the judgment, it looks as if the Report in the *Indian Cases* misprinted 29 for 39.

1. (1913) 25 M.L.J. 447 = 21 I.C. 213, [on appeal from *Koligiri Venkataramanier v. Patibanda Basayya*, (1912) 23 M.L.J. 620]; *Narasimham v. Venkayya*, (1915) 31 I.C. 796.

2. (1922) Nag. 212 = 18 N.L.R. 96.

CHAPTER XXVII

Termination of Execution

Satisfaction of decree—Certification of payments—By decree-holder—By judgment-debtor—Uncertified payments—Rateable distribution—Section 73, C. P. Code—Object of the section—Scope of the section—Cases of set off—Application for execution—Court holding assets—Instances of assets—Instances of “not assets”—Before the receipt of assets—Decrees for payment of moneys—Mortgage-decrees—Against the same judgment-debtor—Sale of property subject to mortgage—Appeal—Revision—Wrong distribution—Suit for refund—Freeman on delivery of property and Writ of assistance—Law in England, —*Fi Fa*—*Eligit*—Writ of possession—Writ of delivery—Delivery of moveables—Delivery of property not in the judgment debtor’s possession—Delivery of debts—Delivery of negotiable instruments or shares—Vesting of moveable property—Result of sale of moveables—Delivery of property in occupancy of judgment-debtor—Delivery of property in occupancy of tenant—Decree for immoveable property—Delivery under that decree in occupancy of tenant—Delivery, actual or symbolical—Symbolical delivery—Effect of symbolical delivery—Symbolical delivery when actual delivery is due—Joint possession—Effect of Symbolical possession—Symbolical possession ineffective against third parties—Symbolical possession taken instead of actual possession—Effect of delivery against the trespassers—Second application for delivery—If delivery recorded—Limitation for application for delivery—Art. 165—Art. 181—Resistance or obstruction—Inquiry into complaint—Dispossession of stranger—Co-parcener—Sub-tenants—Bar of Limitation—Order when conclusive—No change in the law—Remedy by suit—Second application when delivery recorded—Limitation—Art. 137—Art. 138—Art. 142—Art. 144—Procedure for delivery—Where the purchaser is a stranger—Where the purchaser is the decree-holder—Remedy of judgment-debtor.

A decree is satisfied by payment, performance or adjustment. Execution terminates when the decree is so satisfied. Satisfaction of decree.

Under Order 21 rule 1, C. P. Code,

“(1) All money payable under a decree shall be paid as follows, namely :—

(a) into the Court whose duty it is to execute the decree ;

(b) out of Court to the decree-holder ;

(c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (11) notice of such payment shall be given to the decree-holder."¹

The adjustment contemplated by this rule means some kind of satisfaction or payment of the decree. In execution a money decree cannot be converted into payment in instalments in pursuance of an arrangement between the parties.² An arrangement made pending an appeal that the original decree should be inexecutable in part is one that cannot be pleaded in bar of execution of the appellate decree.³

The rule does not apply to mortgage decrees.⁴ Payment of money into Court under a decree must be notified to the decree-holder in writing and served on him in the way prescribed for service of summons.⁵ Payment to the attaching creditor of a decree-holder is not payment to a decree-holder under this rule, as the former is not a decree-holder within s. 2 (3) of the Code.⁶ Where the judgment-debtor without notice of the assignment of the decree or of the petition put in by the assignee for execution deposits the money in Court, then it amounts *ipso facto* to a complete discharge.⁷

Payment in satisfaction of a compromise decree can be made either directly to the decree-holder or

1. For full Commentary, see Vol. I, Chap. VII, 232 *et seq.*

2. *Haidar v. Kailash*, (1925) Oudh 136.

3. *Ramanathan v. Venkatachellam*, (1923) 44 M.L.J. 599 = 72 I.C. 836.

4. *Ambi v. Valiya*, (1923) 45 M.L.J. 687 = 75 I.C. 566.

5. *Baliram v. Ghasiram*, (1924) 81 I.C. 1001.

6. *Rani Badan v. Choudhri Ram*, (1924) 80 I.C. 947.

7. *Tata Iron and Steel Co., Ltd. v. Baidyanath*, (1923) 2 Pat. 754.

into the Court. If the judgment-debtor chooses the latter course and the Court is closed on the day the payment is due, payment made on the next re-opening day is good.¹

Deposit by the judgment-debtor under Order 21, rule 89 to prevent confirmation of sale, though made after 30 days of sale, can be treated as payment under this rule for certification.²

Under Order 21 rule 2, C. P. Code,³

Certification
of payments.

“(1) Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree.”

This rule only contemplates satisfaction of a decree in whole or in part or adjustment thereof which may amount to payment of whole or part of

1. *Sankaran v. Kummakattil Ezhuvaran*, (1925) 48 M.L.J. 596=87 I.C. 560; *Mahomed Hashim v. Radha Kishen*, (1925) All. 687=87 I.C. 620.

2. *Vithal Singh v. Agarchand*, (1925) Nag. 17=79 I.C. 903.

3. See for full commentary, Vol. I, Chap. VII, 240 *et seq.*

the decree. In its ordinary sense, adjustment is a word of wide significance, but obviously in this rule it is used to signify some kind of satisfaction or payment of the decree.¹ Payment need not be both certified and recorded.² It may either be certified or recorded. When the decree-holder admits satisfaction of the decree, the decree ceases to exist and the power of the Court in execution ceases at once.³

By decree-holder.

An application to record adjustment need not be in writing nor signed by the decree-holder.⁴ No particular form is necessary, and a mention of payments in the application for execution is sufficient certification.⁵ But the Allahabad High Court has taken a different view and requires a formal application by the decree-holder informing the Court of the payment and a formal order of the Court recording the payment.⁶

There is no limit of time for the decree-holder to certify payment of his decree.⁷ But in order to save limitation for his decree, the payments must conform to the provisions of the Indian Limitation Act relating to extension of time,⁸ though according

1. *Haider Mirza v. Kailash Narain*, (1925) Oudh 136=80 I.C. 454.

2. *Pitchakkuttiya Pillai v. Doraiswami*, (1925) 47 M.L.J. 498=82 I.C. 588.

3. *Nilkanth v. Yeshwant*, (1922) Nag. 248=66 I.C. 331.

4. *Mt. Perabai v. Chawani Prasad*, (1924) Nag. 185.

5. *Jalim Chand v. Yussuf Ali*, (1925) Cal. 1012; *Baley Mahammad v. Aijanmai*, (1922) Cal. 30=68 I.C. 780; *Fattu v. Nanak*, (1924) Lah. 676; *Madan Mohan v. Haru Lal*, (1921) 35 C.L.J. 566=64 I.C. 72.

6. *Brij Nath v. Panna Lal*, (1924) 46 All. 635.

7. *Radhakant Lal v. Parbati Kuer*, (1921) 6 Pat. L.J. 337=63 I.C. 535; *Pandurang v. Jagya*, (1921) 45 Bom. 91. See Vol. I. 259 *et seq.*

8. *Madan Mohan v. Haru Lal*, (1921) 35 C.L.J. 566=64 I.C. 72; (1919) 46 Cal. 22; *Maung Law San v. Maung Po Thein*, (1925)

to the Allahabad High Court a decree-holder cannot certify payment of his decree after the decree has become time-barred.¹

For an application by the judgment-debtor to record satisfaction of a decree the limitation is prescribed by Article 174 of the Indian Limitation Act.² Mere omission on the part of the decree-holder to certify the fact of adjustment of the decree, notwithstanding his promise to do so, does not entitle the judgment-debtor to override the period of limitation provided in Article 174 and to secure an investigation of the very same matter and an extension of time by invoking the terms of Section 47.³

Where a decree is attached without notice to the judgment-debtor bound by it and the latter pays the decreed amount to the decree-holder, he is entitled to have satisfaction entered up under this rule, and the attaching decree-holder has no right to object to it.⁴ Dismissal of an application by the judgment-debtor under rule 2 (2) does not bar the

2 Rang. 393 ; *Pandurang v. Jagya Bhan*, (1921) 45 Bom. 91 ; *Jalim Chand v. Yusufali*, (1925) Cal. 1012.

1. *Chattar Singh v. Amir Singh*, (1916) 38 All. 204 ; *Mt. Jamwanti v. Mt. Mohan Dei*, (1924) Oudh. 392=79 I.C. 799 ; *Brijnath v. Panna Lal*, (1924) 46 All. 635. See *Amar Singh v. Mt. Ram Dei*, (1925) All. 802=89 I.C. 415.

2. *Baley Mahammad v. Aijan Mal*, (1922) Cal. 30=68 I.C. 780.

3. *Mukundalal v. Bansidhar*, (1923) 50 Cal. 468 ; *P. R. P. L. Chetty Firm v. G. Lon Pow*, (1923) Rang. 103 ; *Gharry v. Gourya*, (1921) 46 Bom. 226 ; *Alathur Badruddin v. Gulam Mohideen*, (1911) 36 Mad. 357 ; *Motoomal v. Teoomal*, (1924) 79 I.C. 89 ; *Mukunda Lal v. Bansidhar*, (1923) 76 I.C. 311 (case law discussed). See *contra*, *Surji Narain v. Uland Singh*, (1925) Oudh. 225=78 I.C. 776.

4. *Nagu Reddiar v. Veerappa*, (1921) 13 L.W. 34=61 I.C. 815.

decree-holder's certifying the payment under rule 2 (1).¹ One of two joint decree-holders cannot certify payment of the decree, so as to bind the other except to the extent of his own ascertained share.²

Uncertified
payments.

The Court executing the decree is barred *in limine* from considering any allegation that a payment or adjustment not certified has been made.³ A surety for a judgment-debtor is under the same disability as the judgment-debtor.⁴ It makes no difference that under the decree payment is required to be made not to the decree-holder but to a third person.⁵

Raghunath v.
Gangaram.

In *Raghunath v. Gangaram*,⁶ the Bombay High Court has held that when an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree-holder under Order 21 rule 16, the application is made to the Court as a Court which passed the decree and not as a Court which is executing the decree, and it is therefore open to the judgment-debtor to plead that the claim had been satisfied even though the formalities of rule 2 have not been followed. It is hard to follow the reasoning of their Lordships and to say that different considerations apply to decree-holders and their assignees. The rule says that in the case of assignee decree-holders, the application

1. *Sadho Saran v. Mt. Subhadra*, (1925) Pat. 822.

2. *Sadho Saran v. Mt. Subhadra*, (1925) Pat. 822=89 I.C. 185; *Pitchakuttiya Pillai v. Doraiswami*, (1925) Mad. 230=82 I.C. 588.

3. *Mehbunnissa v. Mehedunissa*, (1925) 49 Bom. 548 [over *Hansa v. Bhawa*, (1916) 40 Bom. 333] ; *Ganesh v. Yeshwant*, (1923) Bom. 253 ; *Mulchand v. Champa*, (1925) Lah. 566 ; *Arunachellam v. Panchali*, (1922) Mad. 66=66 I.C. 880 ; *Messrs. Chettiar Firm v. Ma Tin Tan*, (1925) Rang. 349.

4. *Onkarmal v. Nritya Gopal*, (1923) Cal. 313=67 I.C. 885.

5. *Mahadeo Prasad v. Hamidan*, (1923) 45 All. 304.

6. (1923) 47 Bom. 643. See *Ramayya v. Krishnamurti*, (1916) 40 Mad. 296.

for execution of the decree must be made to the Court which passed it, that is, in that case, the Court of execution is primarily the Court that passed the decree though, in cases where property is situate elsewhere, the Court only transmits the decree on the application. On application made by the assignee the Court which passed the decree is an executing Court only and it is as executing Court it passes an order. Under Order 21 rule (1), money payable under a decree shall be paid into *the Court whose duty it is to execute the decree* and this indicates that the Court that passed the decree into which the money can doubtless be paid is a Court whose duty it is to execute the decree.¹

(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the Costs of realisation, shall be rateably distributed among all such persons :

Rateable
distribution.
S. 75, C. P.
Code.

Provided as follows :—

- (a) Where any property is sold subject to a mortgage or charge, the mortgagee or encumbrancer shall not be entitled to share in any surplus arising from such sale ;
- (b) Where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may with the consent of the mortgagee or incumbrancer, order that the property be sold free from mortgage or charge, giving to

1. See *Sadagopa v. Seilammal*, (1922) Mad. 570.

C. P. Code,
S. 73.

the mortgage or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

(c) Where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of the sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interests and principal moneys due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets'.¹

Under the C.P. Code of 1859, the attaching creditor had priority for payment out of the proceeds of the property attached and sold, and it was the surplus only that was liable for distribution rateably among the subsequent attaching creditors. Under the later Codes, this preference to the attaching creditor was taken away.²

1. C. P. Code, s. 73 (=Old Code s. 295.)

2. See *Vishvanath v. Virchand*, (1881) 6 Bom. 16 ; *Kommachi v. Pakker*, (1897) 20 Mad. 107.

In *Bithaldas v. Nand Kishore*,¹ Strachey C.J. said "The object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property."

Object of the section.

The addition of the word 'passed' in the present section has not restricted the application of the section and has not made any change in the law.² An executing Court, when rateably distributing the proceeds of a sale in execution, is doing a ministerial act as a matter of administration, and cannot go into the question whether the decree under which distribution is claimed was obtained by fraud.³

Scope of the section.

The distribution is limited to the decrees and

1. (1900) 23 All. 106 (116); *Dwarka Das v. Jadab Chandra*, (1924) 51 Cal. 761; *Hassoon Arra Begum v. Jawadoonnissa*, (1878) 4 Cal. 29; *Fink v. Maharaj Bahadur Singh*, (1899) 4 C.W.N. 27.

2. *Mt. Inderbasi v. Satnarain*, (1923) Pat. 211=74 I.C. 626; *Dwarkadas v. Jadab Chandra*, (1924) 51 Cal. 761.

3. *Shankur Sarup v. Mejo Mal*, (1901) 23 All. 313 P.C.; *Dattatraya v. Purshottan*, (1922) 46 Bom. 625, overruling *Chaganlal v. Fazarali*, (1888) 13 Bom. 154; *Raghunath v. Raj Chatrapat*, (1896) 1 C.W.N. 633; *Seth Maganlal v. Raja Raghunath Rao*, (1923) 19 N.L.R. 172=75 I.C. 749; *Bib Uma v. Mt. Rasoolan*, (1926) 5 Pat. 445. See *Suryanarayana v. Gopala*, (1912) 23 M.L.T. 699=17 I.C. 940.

cannot be extended to the costs of the application for execution, unless, prior to the receipt of the money, there was an order in terms that such costs are to be added to the amount of the decree.¹

Cases of set-off.

Permission granted to a judgment-creditor to set off the price of the property sold against his debt must be taken to be granted subject to the provisions of this section. The Court can direct the decree-holder summarily to deposit the sum due to the rival decree-holders entitled to rateable distribution.² If at the time when the application for set off is made, there are no obstacles to the grant of it, the Court will ordinarily be bound to grant it and if that is done, there can be no receipt of assets by the Court within the meaning of section 73. An order allowing set off under O. 21 s. 72 is not equivalent to receipt of assets. It is a disposal of the purchase-moneys over which the Court re-acquired dominion on the date of the sale.³

An application for set-off is equivalent to a payment by a cheque on the Court which is subsequently found to be in order and honored, and therefore when the decree-holder applies for set-off of his claim against the decretal amount, the money is "received" on the date when such application is made. If the application is made not to the transferee Court, but to the parent Court through the transferee Court, or if made to the transferee Court and simply transferred by it to the parent Court

1. *Noor Mahomed v. Belasiram*, (1921) 47 Cal. 515.

2. *Madden v. Chappani*, (1887) 11 Mad. 316; *Sbrabji v. Govinda*, (1891) 16 Bom. 91.

3. *Mohan Dal v. Amar Nath*, (1925) Oudh. 287 = 80 I.C. 40.

for acceptance, the date of receipt is the date on which the application reaches the parent Court.¹ Cases of set-off.

In *Akhoy Kumar v. Surendra Lal*,² the plaintiff's father and defendant applied for execution of their decrees against the same judgment-debtor. The plaintiff's father died before the assets were received by the Court. The judgment-debtor's property was sold and the defendant was allowed to set off the purchase-money against the decretal amount. The plaintiff made an application for substitution in the place of the deceased father and it was ordered and he then applied for rateable distribution of the assets. It was dismissed, and a suit to set aside that order was held not maintainable.

To entitle a person to rateable distribution under this section, he must have *made application for the execution of his decree*. The application must be in the form prescribed by Order 21 rule 11 (2), C.P. Code. An application for rateable distribution is not an application for execution.³ Application for execution.

To entitle a decree-holder to rateable distribution, he must have applied for execution of his money decree before the receipt of the assets; it is not necessary that his application for execution should be such as would have ended in his successfully obtaining satisfaction of the decree; so that, for instance, if the application was for arrest and the judgment-debtor could not be arrested as being

1. *Wali Mahomed v. Abdul Hamid*, (1926) Nag. 380=95 I.C. 205.

2. (1926) Cal. 957=96 I.C. 378.

3. *Dwarkadas v. Ghasi Ram*, (1922) 17 N.L.R. 143=64 I.C. 53; *Arunachellam v. Hajee Sheik Meera*, (1910) 34 Mad. 25; *Ramanathan v. Subramania*, (1903) 26 Mad. 129; *Ali Mahomed v. Mahomed Noor*, (1925) Nag. 382.

outside the jurisdiction, the circumstance was immaterial for the application of this section.¹

More persons than one must have made *application* to the Court *for the execution* of decrees for the payment of money. An attachment before judgment is in no sense an application for execution. A decree-holder who has attached before judgment is not entitled to rank as an applicant in execution and as such, to obtain in execution a rateable share of the property which he has attached, unless subsequently to his decree he has applied for execution in accordance with law.²

An attachment before judgment does not by itself create any interest in the property attached and a person who has merely obtained an order for attachment before judgment cannot restrict the rights of an attaching creditor who has previously obtained his decree. An order for rateable distribution cannot be made in favour of a person who has not obtained his decree but only an order for attachment before judgment and who is thus incompetent to apply for execution at the time when the assets were realised.³ If the Court makes an order paying part of the proceeds to the person holding an attachment before judgment, the order is liable to be set aside and a suit is maintainable for the payment of it.⁴

1. *Subramaniam v. Ramaswami*, (1926) Mad. 179=91 I.C. 11.

2. *Pallonji v. Edward Vaughan*, (1888) 12 Bom. 400; *Arunachellam v. Haji Sheik Meera*, (1910) 34 Mad. 25, overruling *Veerayya v. Annamalai Chetty*, (1903) 31 Mad. 502; *Bisheshar v. Ambika Prasad*, (1915) 31 All. 575 (581); *Basiram Malo v. Kattayani*, (1911) 35 Cal. 449, *Kasiwar De v. Aswini*, *Kumar Pal*, (1926) Cal. 249=90 I. C. 527.

3. *Madhusudan v. Rsh Mohan*, (1915) 21 C. L. J. 614=30 I. C. 38; *Arunachellam v. Haji Sheik Meera*, (1910) 34 Mad. 25.

4. *Bisheshar v. Ambika Pershad*, (1915) 37 All. 575.

When there are several attachments before judgment and the moneys are received before any of the plaintiffs obtained a decree, the money should be held to the credit of the suits and must be rateably distributed among all the attaching creditors who have subsequently obtained decrees.¹ In such a case the attachments would not be in execution and the sale proceeds would not be realised in execution, so that section 73 would have no application.²

Application
for execution.

In *Nachiappa Chettiar v. Subbier*,³ in pursuance of an order for attachment before judgment obtained by A, piece goods were sold pending the suit and the sale proceeds were deposited in Court on 11th April 1917, and the decree was passed on 2nd July 1917. In the meantime two other persons B and C obtained decrees against the same judgment-debtor and applied for payment of the moneys. The Full Bench held that the amount deposited in Court became "assets held in Court" only when the Court passed an order as the application of A for payment in execution of his decree and that A, B and C were entitled to rateable distribution under section 73.

The application for execution must be made to the Court holding the assets.⁴ When it is found

Court holding
the assets.

1. *Subramaniam v. Sankara*, (1922) Mad. 236=68 I. C. 714; *Krishna Mal v. Krishna Mal*, (1924) Lah. 70=69 I. C. 718.

2. See *Arunachellam v. Hajee Sheik Meera*, (1910) 34 Mad. 25 explaining *Sewdut Roy v. Sree Canto Maity*, (1906) 33 Cal. 639; *Bisheshar Das v. Ambika Prasad*, (1915) 37 All. 575 (581).

3. (1923) 46 Mad. 506 F. B. on appeal from (1921) M. W. N. 817 [overruling *Venkataratnam v. Adamji*, (1919) 42 Mad. 992]; *Viswanathan v. Arunachellam*, (1921) 44 Mad. 100 F. B.; *Sewdut Roy v. Sree Canto Maity*, (1906) 33 Cal. 639; see also *Bisheshar v. Ambika Prasad*, (1925) 37 All. 575 (581); *Indaji v. Coonerji*, (1926) Bom. 242=93 I. C. 852.

4. *Firm of Nanak Chand v. Firm Gujar Mal*, (1926) Lah. 538=95 I. C. 151; *Barendranath v. Martin and Co.* (1921) 33 C. L. J. 7=62 I. C. 167.

Court holding
the assets.

that property attached by a lower Court is already, or thereafter becomes, subject to an attachment issued from a superior Court, the decree-holder in the lower Court must apply to that Court to transfer his application to the higher Court if he desires to secure the appropriation of the attached property and its proceeds to the satisfaction of his decree. This view was taken in Bombay.¹ A contrary view has been taken in Calcutta and Madras. Where for instance assets are realised by the District Court and the judgment creditor seeking distribution is the holder of a decree of the Munsiff's Court who had attached the property, the right to share in the proceeds realised by sale of attached property is independent of the transfer of the decree for execution to the District Court and arises by virtue of his attachment.² When execution of a decree is stopped by an order of a superior Court, such decree-holder can apply to that Court for rateable distribution without a fresh application.³ When the lower Court has ordered the transfer of the decree for execution to the superior Court, an application after such order to the superior Court before it has received a copy of the decree would be sufficient to satisfy the requirements of the section.⁴ A contrary view has been taken in Calcutta : There is nothing in Section 73 (295), which requires that before an attaching creditor can have his claim determined, he must obtain a transfer of

1. *Nimbaji v. Valia*, (1892) 16 Bom. 683; *Dattatraya v. Rahimtulla*, (1893) 18 Bom. 456; and *Andanapa v. Bhimrao*, (1894) 19 Bom. 539.

2. *Clark v. Alexander*, (1894) 21 Cal. 200; *Hari v. Anandaran*, (1897) 2 C.W.N. 126; *Arimuthu v. Vyapuri*, (1910) 35 Mad. 568; *Narasimhachariar v. Krishnamachari*, (1914) 26 M.L.J. 456.

3. *Govindanath v. Kedarnath*, (1925) Cal. 966 = 87 I.C. 783.

4. *Arimuthu v. Vyapuri*, (1910) 35 Mad. 88.

his decree to the superior Court and apply to that Court for execution; the duty of the superior court under section 63 (285) is to consider and determine the rights of the attaching creditors in all the cases to which that section applies, whether they have applied to the superior Court or not.¹ When execution of a decree is stopped by the order of a superior Court, such decree-holder can apply to that Court for rateable distribution without a fresh application.²

Under Section 295 of the C. P. Code, 1882, the "Realised," expression used was "Whenever assets are realised by sale or otherwise in execution of a decree, and more persons than one have, prior to the realisation, applied to the Court by which such assets are held." The term "realised" meant converted into cash or into a form whereby it becomes available for immediate distribution.³ It was thought that the words "by sale or otherwise" in Section 295 meant "by sale or other process in execution provided for by the Code."⁴ So where the judgment-debtor voluntarily paid the money due under a decree,⁵ to remove or prevent attachment or to escape from or get out of arrest the sum was not liable for rateable distribu-

1. *Clark v. Alexander*, (1893) 21 Cal. 200; *Bykantsnath v. Rajendro Narain*, (1885) 12 Cal. 333; *Obhoy Churn v. Gulam Ali*, (1881) 7 Cal. 410; *Har Bhagat v. Anandram*, (1897) 2 C.W.N. 126.

2. *Girindranath v. Kedarnath*, (1925) Cal. 965=87 I. C. 783.

3. *Manilal v. Nanabhai*, (1903) 23 Bom. 264.

4. *Prosonnomoyee v. Sreenath Roy*, (1894) 21 Cal. 809; *Bishen Chunder v. Monmohinee*, (1867) 8 W. R. 501.

5. *Gopal v. Chunni Lal*, (1895) 8 All. 67; *Vibudhipriya v. Yusuf Sahib*, (1905) 28 Mad. 380; *Sew Bux v. Shib Chunder*, (1886) 13 Cal. 225; *Gopal Sahu v. Sheo Karan*, (1903) P. R. 6 (case of *ultra vires* attachment); *Firm of Haji Umar v. Rooba*, (1924) 81 I.C. 7 (It applies only to cases where money is realised by process of Court).

Assets.

tion.¹ Under Section 55, proviso 4, the same view was taken in Bombay² and Sindh.³ In Madras in *Thiraviyam Pillai v. Lakshmana Pillai*,⁴ the learned judges said, "We are prepared to concede that if money is paid outside the Court and the decree-holder certified the payment, it cannot be said that it is an asset held by the Court. It may be in such a case, as the attachment would cease to subsist, rival decree-holders can have no remedy; but if money is paid into Court by the other modes mentioned in rule 55, we are not satisfied that the money cannot be regarded as an asset held by the Court." So in Calcutta in *Noor Mahomed v. Bilasiran*,⁵ it was held that money paid by the judgment debtor to the sheriff was "assets, liable to be distributed among all the decree-holders who had previously applied for execution. Rankin J. said, 'The object of the new Code in using larger language can only be to avoid anomaly. To introduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor is to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which if applicable is very difficult to imply.'" Commenting on the change in the language of Section 73, with "where assets are held by a Court," the Madras High Court said in *Thiraviyam Pillai v. Lakshmana Pillai*,⁷ that "the change was

1. *Purshottam v. Suraj*, (1882) 6 Bom. 588.

2. *Sorabji v. Kala*, (1911) 36 Bom. 1564; *Ebji v. W. A. Graham and Co.*, (1917) 19 Bom. L. R. 274=39 I.C. 623.

3. *Mahbub v. Buksh Elahai*, (1921) 14 S. L. R. 164=61 I. C. 424.

4. (1917) 41 Mad. 616. See *Karmappa v. Annamalai*, (1913) 20 I. C. 919.

5. (1919) 47 Cal. 515.

6. *Harai Saha v. Faizhur Rahman*, (1913) 40 Cal. 619 (622).

7. (1917) 41 Mad. 616.

apparently intended to set at rest the question Assets. whether the word realisation should not be restricted to what is paid in for virtue of process taken in execution; but apparently the Legislature has not succeeded in the object. There can be no question that the language of the present Code is wide enough to cover cases where moneys are in the hands of the Court by whatever process the same has been realised," and differed from the view expressed in Bombay in *Sorabji v. Kola Raghunath*,¹ that under the New Code too the money to be held by the Court must have reached its hands in execution. A similar view was taken in Calcutta that 'assets' now include any assets held by the Court irrespective of the manner with which the cause into the possession of the Court and not restricted to what is paid by virtue of process taken in execution. In the later case of *Nathmal v. Maniram*,² when this decision in *Sorabji's case* was disapproved, and Pratt J. said that the amendment in the present Code intended to provide (a) that all assets held by the Court are available for rateable distribution, (b) but the asset must be something obtained in execution into a form available for distribution among the judgment-debtors.³

In *Vibhudapriya v. Yusuf Sahib*,⁴ the Madras High Court held under the C. P. Code 1882 that when after attachment of property in execution of a decree, the judgment-debtor sold the property to a stranger to pay off the decree-holder and the

1. (1911) 35 Bom. 156.

2. (1919) 21 Bom. L. R. 975=53 I.C. 599 See also *Sri Kenna v. Haji Mahomed*, (1913) 38 Mad. 221.

3. *Hari Charan v. Birendranath*, (1922) 35 C. L. J. 327=70 I. C. 541; *Ghisulal v. Todarmul*, (1922) Cal. 19=70 I. C. 539.

4. (1905) 28 Mad. 380.

Assets.

stranger paid the decree amount into Court, the amount was not 'assets' under section 295. Similarly where in *Sorabji v. Kala Raghunath*,¹ two decree-holders attached immovable property and other creditors had also applied for execution without issuing attachment, moneys, paid into Court to satisfy the decrees of the two attaching creditors by a third person at the instance of the judgment-debtor under Order 21, rule 55, was held by the Bombay High Court not to be 'assets' on the ground that the money was not realised in process of execution and that rateable distribution would nullify the provisions of rule 55. Under Section 77 of the present Code, in *Nathmal v. Maniram*,² however, in the same Court Pratt J. disapproved of this view and adopted the view taken in Madras in *Thiraviyam Pillai v. Lakshmana Pillai*,³ viz., "that money paid under Order 21, rule 55 is an asset held by the Court and like the money paid to stop a sale under rule 83 available for distribution except that Pratt J. differed from this case in that I saying that Section 73 is restricted to what is paid into Court by virtue of process of execution.

Instances of assets.

The following were held to be "assets" available for rateable distribution; debts attached and paid into Court by garnishee, under section 268 (O. 21 r. 46);⁴ money attached while in the custody of a public officer and paid by him, under

1. (1911) 36 Bom. 156.

2. (1919) 21 Bom. L. R. 975=53 I. C. 599.

3. (1917) 41 Mad. 616.

4. *Sorabji v. Govind*, (1892) 16 Bom. 91; *Amba v. Baijnath*, (1917) 42 I.C. 436. If there is a further order directing payment to a particular decree-holder before attachment by others it is not distributable, *Srinivasa v. Seetharama*, (1895) 19 Mad. 72.

section 272 (O. 21 O. 52);¹ money realised by execution of an attached decree under section 273 (O. 21 r. 53);² money paid under section 291 (O. 21 r. 69) to the officer conducting the sale;³ moneys realised by the receiver appointed in execution of a decree.⁴ Instances of assets.

The following are not 'assets' available for distribution under section 73 of the present C. P. Code : money paid into Court under O. 21, r. 89;⁵ money paid by a judgment-debtor out of Court;⁶ proceeds of the sale of property given as security for satisfaction of a decree;⁷ money deposited in Court under O. 38 r. 2 on arrest before judgment;⁸ money deposited for payment to a particular decree-holder.⁹

The following are 'assets' under section 73, compensation money paid by the Government into Court for apportionment among claimants to a land acquisition case;¹⁰ money paid into Court to raise

1. *Manilal v. Nanabhai*, (1904) 28 Bom. 264.

2. *Amara v. Annamalai*, (1908) 13 Mad. 502.

3. *Purshottam v. Suraj*, (1882) 6 Bom. 588.

4. *Fink v. Bahadur Singh*, (1889) 26 Cal. 772.

5. *Harai Saha v. Faizulur Rahman*, (1913) 40 Cal. 619; *Thiraviyam Pillai v. Lakshmana Pillai*, (1917) 41 Mad. 616; *Golstaun v. Woomes Chandra*, (1917) 44 Cal. 789; *Goteti Vignanesvaradu v. Venkata Suryanarayanamoorthi*, (1918) 7 L.W. 573 = 45 I.C. 782; *Murugappa v. Palniappa*, (1917) 42 I.C. 507; Then no change in the law : *Roshun Lall v. Ram Lall*, (1903) 30 Cal. 262; *Hari Sundari v. Shashi Bala*, (1896) 1 C.W.N. 195; *Bihari Lal v. Gopal Lal*, (1897) 1 C.W.N. 695.

6. *Gouri Dutt v. Amar Chand*, (1912) 15 C.L.J. 49 = 13 I.C. 907; *Thiraviyam Pillai v. Lakshmana Pillai*, (1917) 41 Mad. 616.

7. *Subramanian v. Raja of Ramnad*, (1917) 41 Mad. 327 (332); *Hamilton v. Shankar Dass*, (1915) 29 I.C. 791.

8. *Dost Mahomed v. Subrahmanian*, (1915) 8 Bur. L.T. 22 = 29 I.C. 714.

9. *Firm of Haji Umar v. Rodba*, (1925) Nag. 157.

10. *Sait Siva Pratapa v. A.E.L. Mission*, (1926) 49 Mad. 38.

Instances of
assets.

attachment of moveables under O. 21 r. 43;¹ money attached or under a temporary injunction under O. 39 r. (1).²

Where on security furnished, property attached before judgment was released and after decree when the decree-holder applied for execution the sureties deposited the decretal amount into Court, the Calcutta High Court held that as another decree-holder applied for execution just before the deposit was made, on the very day of deposit, he was entitled to rateable distribution of the amount so deposited by the sureties.³

Before the
receipt of
assets.

The application must have been made *before the receipt of the assets*. These words in italics were substituted for the words "prior to realisation" in the C.P. Code, 1882. When the application for execution is made on the same day on which the assets are received, the Court is bound to ascertain the order in which they occurred.⁴ This would be a difficult process for the sequence is hardly remembered in the course of a day. If it happens that the money is presented and the application for execution is presented at the same time to the ministerial officer of the Court, it will be purely the caprice of such officer to prefer one to the other. Law takes no account of fractions of a day,⁵ but this decision goes against that principle.

Where under Order 21 rule 65, the Court appoints a special person to conduct the sale, the

1. *Indaji v. Coonerji*, (1926) Bom. 242=93 I.C. 852.

2. *Ramachandra v. Latohman*, (1915) 7 Bur. L.T. 227=29 I.C. 941.

3. *Ghisulal v. Todarmull*, (1922) Cal. 19=70 I.C. 539.

4. *Arimuthu v. Viyapuri*, (1910) 35 Mad. 568.

5. *Page v. More*, (1850) 15 F. B. 685. WOODFALL'S Landlord and Tenant (19th Edn.), 405.

assets are "received" when the money is paid to that person and not when that person pays it into Court.¹

Before the receipt of assets.

Under the C. P. Code of 1882, it was held that where property was sold in execution of a decree the sale proceeds were "realised" not when the purchaser deposited 25 per cent of the purchase money in Court, but when the balance of the purchase-money was paid, for the deposit of 25 % is not 'assets' and is not immediately available for payment to the decree-holder, and if the purchaser does not pay the balance of the price, this 25 % does not (*now* necessarily) go back to the person who paid it, but is, after the deduction of the expenses of the sale, forfeited to the Government. If therefore a person applied in execution before the full price is paid into Court, he was entitled to rateable distribution.² Under the present Code the position is the same; for the expression now used is "before the receipt of such assets."³ But when the purchaser pays the 25 % deposit but fails to pay the balance and on a re-sale loss occurring, the decree-holder attaches 25 % deposit, it becomes "assets" within the meaning of this section and other decree-holders are entitled to share in it. This can occur only when the deposit is not under Order 21 rule 86 forfeited to the Government.

A person applying for execution after the full price has been received by the Court has no right

1. *Gaulstun v. Bannerjee*, (1917) 44 Cal. 789.

2. *Hafez v. Damodar*, (1891) 18 Cal. 242; *Arimuthu v. Vyapuri*, (1910) 35 Mad. 588; *Maharaja of Burdwan v. Afunba Krishna Roy*, (1911) 14 C.L.J. 50=10 I.C. 527; *Arimuthu Chetty v. Vyapuri Pandaram*, (1911) 21 M.L.J. 505=8 I.C. 852; *Girindranath v. Kedarnath*, (1925) Cal. 966=87 I.C. 783.

3. *Vishvanath v. Virchand*, (1882) 6 Bom. 16.

Before the receipt of assets.

to rateable distribution, though the sale itself is still unconfirmed.¹ An application for execution is good for rateable distribution, even if made when the sale is going on.³ When several items of immovable property are sold in execution of a decree, in separate lots, the assets are realised when the *whole* of the proceeds are paid into Court, but not when the proceeds of the sale of a few items only are paid into Court.⁴ If however the Court advertises sale of several items of property but sells some only and stops the sale of the rest, the payment of the price of the items sold will be "receipt &c., of assets", entailing rateable distribution. In the case of sale of moveables, the whole of the purchase money is paid at the time of the sale or soon after it and the price paid for each lot becomes available 'assets' at once, though all the moveables may not be sold on the same date. A person therefore who applies in the interval between the sales of two lots of attached moveable property is not entitled to rateable distribution in the proceeds of the sale held prior to his application for execution.⁵

Decrees for payment of money.

The decrees which can claim rateable distribution under this section must be *decrees for the payment of money*. Every decree, under which money is payable, though it might grant other relief is so far a decree for money.⁶ A decree for un-

1. *Mahant Prayag Doss v. Raja of Kalahasti*, (1926) 49 Mad. 570.

2. *Maharaja of Burdwan v. Apurba*, (1911) 14 C.L.J. 50=

3. *Hurmozi Begam v. Ayesha*, (1921) Pat. 204=57 I.C. 421.

4. *Ramanathan v. Subramania*, (1902) 26 Mad. 179; *Birendra v. Martin & Co.*, (1921) 33 C.L.J. 7=62 I. C. 167; *Wali Mahomed v. Abdul Hamid*, (1926) 4 Nag. 380=95 I.C. 205.

5. *Sur Jan Singh v. Prag Das*, (1918) P.R. 33=45 I.C. 108.

6. *Viraraghava v. Varada*, (1882) 5 Mad. 123; *Ramaswami Aiyar v. Rama Aiyar*, (1892) 2 M. L. J. 288.

ascertained mesne profits is a decree for money. If the holder of such decree has applied to the Court for ascertaining the amount and for the attachment of immoveable property, he comes within this section.¹ A decree directing the payment of money by a person is a decree for payment of money, so far as that person is concerned, notwithstanding that the same decree directs, as against another person, the realisation of the debt from mortgaged property.² A judgment entered up under section 86 of the Indian Insolvency Act, (11 and 12 Vic. c. 21) was held to be a decree for money.³

Decrees for payment of money.

In *Hart v. Tara Prasanna*,⁴ the decree was on a mortgage and directed the realisation of the debt from the mortgaged properties and *from the defendants personally* and the Calcutta High Court held that that was a decree for the payment of money. In *Fazil v. Krishna Bundhoo*,⁵ the same Court distinguished it on the ground that there was a distinct order on the defendant to pay the money and held, following the view taken in Allahabad,⁶ that the C. P. Code observes a distinction between a simple money decree for the payment of money and a decree directing the realisation of money by the sale of mortgaged property and the latter is not a decree

Mortgage decrees.

1. *Hart v. Tara Prasanna*, (1885) 11 Cal. 718 (729).

2. *Delhi and London Bank v. Uncovenanted Service Bank*, (1887) 10 All. 35.

3. *In re Bhagwardas*, (1887) 8 Bom. 571; such a judgment must be executed under the C. P. Code, *In re Candass Narrondas*, (1886) 11 Bom. 138.

4. (1885) 11 Cal. 718.

5. (1898) 25 Cal. 580.

6. *Ram Charan v. Sheobarat*, (1894) 16 All. 418; *Pahalwan v. Narain*, (1950) 22 All. 407; *Jadunath v. Jagmohandas*, (1903) 25 All. 541; *Delhi and London Bank v. Partab Singh*, (1906) 28 All. 771 F. B.

Mortgage
decrees.

coming within the purview of this section, though, after the mortgaged property is sold and if there is any balance, it is to be recovered from the person and other properties of the mortgagor.¹ A contrary view was taken in Madras and it was held that a decree containing an order for sale of the mortgaged property in default of payment of the decretal sum was a decree for money whether or not there was a direction to pay personally.² This latter view was taken in the Punjab and Burma.³

Under the present C. P. Code, it has been held in Madras that a mortgage decree for sale containing an express provision exempting the debtor from personal liability is in no sense a decree for money.⁴ The view taken under the old Code is still maintained in Calcutta.⁵ In Patna it has been held that if a mortgagee holds a money decree apart for his mortgage he can apply for rateable distribution.⁶ In Burma it has been held that a mortgagee who has not obtained a decree against the mortgagor cannot claim a rateable distribution at the instance of another creditor.⁷

Against the
same judg-
ment-debtor.

The decrees for the payment of money must have been passed *against the same judgment-debtor.*

1. *Kartick Nath v. Juggernath*, (1899) 27 Cal. 285. See *Chandi Charan v. Ambika Charan*, (1904) 31 Cal. 792.

2. *Kommachi v. Pakker*, (1897) 20 Mad. 107; *Abdulla v. Doctor Oosman*, (1905) 28 Mad. 224; *Vaidhinadasawmy v. Somasundram*, (1905) 28 Mad. 473 F. B.; *Krishnan v. Venkatapathi*, (1905) 29 Mad. 318.

3. (1908) P. L. R., 121; L. B. R. (1893-1900) 588.

4. *Suryanarayana v. Gopala*, (1912) 23 M. L. J. 699=17 I. C. 940.

5. *Suraja Kumar v. Pramada Sundaree*, (1913) 17 C. W. N. 1039=20 I. C. 829.

6. *Babu Bishun Mohan v. Narayan Prasad*, (1923) 74 I. C. 140.

7. *Po So v. Ba Zan*, (1920) 12 Bur. L. J. 43=57 I. C. 580.

Where property is attached under a decree and another creditor who holds a decree jointly against such debtor and another, has, along with others applied for execution, such creditor is also entitled to rateable distribution.¹ It makes no difference therefor, that under one decree there are more judgment-debtors than in the other.² So where a decree for money was passed against a judgment-debtor personally and as representative of another and another decree against him alone, the first decree-holder is entitled to rateable distribution of the proceeds of the judgment-debtor's property sold in execution of the latter decree.³ The existence of a common judgment-debtor under the competing decrees is not by itself sufficient to give a right under this section, but the application for execution must have been made against the same judgment-debtor.⁴

Against the same judgment-debtor.

If a decree-holder holds a joint and several decree against A, B and C, another decree-holder who has a decree against A alone cannot claim to participate in the proceeds of the property realised in execution of the decree against A, B and C, if the property so realised was the joint property of A, B and C; but if the property realised was the property of A alone, the decree-holder holding a decree against A alone.⁵

1. *Shumbhoonath v. Luchynath*, (1883) 9 Cal. 920; *Sarat Chandra v. Doyal Chand*, (1899) 3 C. W. N. 368; *Ganesh Das v. Shiva Lakshman*, (1903) 30 Cal. 58 F. B.

2. *Chhotalal v. Nabi bhai*, (1905) 29 Bom. 528; *Delhi and London Bank v. Uncovenanted Service Bank, Bareilly*, (1887) 10 All. 35; *Mt. Inderbasi v. Satnarain*, (1923) Pat. 216=74 I. C. 626.

3. *Gutti Lal v. Bir Bahadur Singh*, (1904) 27 All. 158.

4. *Nimbaji v. Vadia*, (1892) 16 Bom. 683; *Iqbal Jahan v. Mummey*, (1907) 10 O. C. 129.

5. *Nimbaji v. Vadia*, (1892) 16 Bom. 683.

Against the
same judg-
ment-debtor.

Where two decrees were obtained against the estate of the deceased testator, each obtained against two of the three executors and one of these two executors was common to the two suits it was held each decree was *prima facie* executable against the estate and the decree-holders were entitled to rateable distribution.¹

When a person obtained a decree against a father and son and another person against the son alone (the father having died before this suit) it was held that the decrees were against "the same judgment-debtor" and the second decree-holder was entitled to rateable distribution of amounts realised in execution of the first decree.² So it was held where one decree was against the father only and the other was against the father and son and property of the joint family of which both were undivided members was sold in execution of the latter decree.³

In *Govind v. Mohoniraj*,⁴ where one decree is against A and the other decree is against the legal representative of A it was held by the Bombay High Court (a) that the two decrees were not "against the same judgment-debtor, though the estate of A may be liable in the case of both the decrees and this section did not make the nature of the liability under the decrees contemplated by it one of the essential conditions for its application; and (b) the fact that an order had been passed, after the death of the judgment-debtors against the

1. *Nilmani Dey v. Hiralal*, (1918) 27 C. L. J. 100=43 I. C. 452.

2. *Grant v. Subramaniam*, (1898) 22 Mad. 241.

3. *Ramanathan v. Subramania*, (1902) 26 Mad. 179.

4. (1901) 25 Bom. 494.

legal representative, did not affect the application of the section, because the section requires that the decrees and not orders should be against the same judgment-debtor. In Oudh, this decision was not approved and the Court said that the object of the section was to provide for rateable distribution of assets upon which two or more persons were considered to have equal claims and if the words "against the same judgment-debtor" were construed absolutely literally, then in many cases the object of the section would be defeated and grave injustice would result; the order must be read as referring more to the property which he represented than to the reason against whom execution had been sought.¹ But the view of the Bombay High Court aforesaid was adopted in Allahabad² and in Madras³ and in Burma⁴ and it was said in Madras that when a decree is obtained against the legal representatives of a deceased person, they are the judgment-debtors and not the estate of the deceased.⁵

Against the same judgment-debtor.

In *Gonesh Das v. Shiva Lakshman*,⁶ the question arose in this way: "The principal defendant obtained judgment against the judgment-debtors, say N, Y and Z. The present plaintiff obtained a judgment against N and Y only and he contends that, under the provisions of Section 295, C. P. Code (1882), he is entitled to a proportionate distribution of the moneys realised by the sale of the property

1. (1902) 8 O. C. 86.

2. *Bholanath v. Maqbul-un-nissa*, (1903) 26 All. 184; *Munshilal v. Muhammad*, (1919) 52 I.C. 305.

3. *Srinivasa v. Kanthimathi*, (1910) 33 Mad. 465.

4. *Toola Ram v. Abdul Gafoor*, (1905) 7 Bur. L. T. 67=24 I. C. 476.

5. *Kaliappian v. Varadarajulu*, (1909) 19 M. L. J. 651.

6. (1903) 30 Cal. 583 F.B.; *Hussain Sahib v. Babaji*, (1926) Bom. 150=93 I. C. 222.

of N, Y and Z, so far as those moneys represent the share of his own judgment-debtors N and Y on that property. The principal defendant replies that he is not so entitled, because he does not bring himself within the provisions of Section 295, in as much as the decrees are not against the *same* judgment-debtor. The question we have to decide is whether the plaintiff is entitled as he claims." The Full Bench answered the question on the affirmative.

Sale of property subject to mortgage.

The words 'any property' in clauses (a) & (b) of the proviso as contradistinguished from "immovable property" in clause (c) shows that a mortgage of moveables is included therein.¹ Clause (b) applied only to a mortgage whose charge is valid against the executing decree-holder. When he holds a money-decree apart from his mortgage he can apply for rateable distribution.² The first paragraph and clauses (a) and (b) have reference only to sales in execution of simple money decrees and to the mode in which sale proceeds are to be rateably distributed among simple money-decree-holders. The provisos contained in clauses (a) and (b) declare the incompetence of a mortgagee or incumbrancer as such to share in any surplus proceeds arising when property is sold subject to his mortgage or charge. But the alternative is afforded him of consenting to the property being sold free of his mortgage and charge, in which case the Court may give him the same rights against the sale proceeds as he has against the property sold.³

1. *Jotindra Chandra v. Rangpur Tobacco Co.*, (1924) Cal. 990.

2. *Babu Bishun v. Narayan Prasad*, (1924) Pat. 434=74 I.C. 140.

3. *Jagat Narain v. Dhundhey Rai*, (1883) 5 All. 566.

In *Mithu Lal v. Kishan Lal*, A mortgaged certain property to B in July 1874, to C in March 1877 and again to B in November 1877. B obtained a decree directing the sale of the property in satisfaction of his two mortgages and it was sold accordingly. Subsequent to the sale, C obtained a similar decree upon his mortgage, and having successfully applied in his own suit to have his decree satisfied out of the sale proceeds after payment of first mortgage of July 1874, brought a suit under the last paragraph but one of section 295 to recover the amount received by B in respect of B's mortgage of November 1877). It was contended that the words "when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon" meant either incumbrance or incumbrances, and that as the property was sold under a decree ordering its sale for the discharge of those two incumbrances, they took priority over C's incumbrance. It was held that C was entitled to maintain the suit: "to so read that section and to so apply it to a case like this would be to frustrate the object the Legislature had in view not only in section 295 but in section 80 of the Transfer of Property Act and would be to apply a principle to the distribution of proceeds which would give priority to a subsequent incumbrance... ..., if we are to treat that incumbrance of November 1877, as in this case the incumbrance within the meaning of clause (c) for the discharge of which the sale was ordered C would not come within the third category of 'distribution, nor would he come under the fourth, for his decree was a decree for enforce-

*Mithu Lal v.
Kishan Lal.*

Sale of property subject to mortgage.

ment of a lien and not a decree for money within the meaning of that clause.''

Unless the mortgagee consents, the decree-holder has no right to bring the property itself to sale and all that he can sell is the residual right of the mortgagor that is, the right to recover the property on payment of the mortgage-money.¹

Where a subsequent encumbrancer claims the benefit of clause (c) the Court must satisfy itself that he is lawfully entitled to priority over the holders of decrees for the payment of money mentioned in the fourth category.²

A mortgagee who does not obtain a decree on his mortgage or charge has no right to obtain by an order in execution or by application payment of any part of the sale proceeds of the property over which he claims his mortgage or charge and a suit lies against him to refund the amount if paid to him.³

Appeal.

An order passed under this section as between parties who are not the same as in the decree in execution of which assets were realised is not a decree under section 47 and no appeal lies against the order⁴ and the order of a District Judge on appeal setting aside the order of a District Munsiff, though the latter order was erroneous is without jurisdiction; when the order is without jurisdiction

1. *Ovanna Perumal v. Maung Tyin*, (1919) 3 U.B.R. 139=51 I.C. 750. See *Benarsi Das v. Gopi Chand*, (1924) Lah. 132=76 I.C. 529.

2. *Barendranath v. Martin & Co.*, (192) 33 C.L.J. 7=62 I.C. 167.

3. *Maung Ta Te v. Maung Nyin*, (1915) 26 I.C. 273; *Babu Bishun Mohan v. Narayan Prasad*, (1924) Pat. 434=74 I.C. 140.

4. See *Gogaram v. Kartick Chunder*, (1868) 9 W.R. 514; *Kashi Ram v. Mani Ram*, (1892) 14 All. 214; *Somasundaram v. Sundaresa*, (1924) Mad. 97.

the High Court should interfere in revision.¹ But where an order does, as a fact, decide a matter covered by section 47 although it is passed ostensibly under section 73, it is appealable so where the order decided that the petitioners were not entitled to rateable distribution, but dismissed the execution petition, it was appealable.²

Where an order for rateable distribution is made among rival decree-holders on a decision of the disputes among them without any objection on the part of the judgment-debtor or without in any way affecting his rights, the order is not one under section 47 or section 144, C.P. Code. If the order for rateable distribution is set aside on appeal there is no power to order restitution under section 144.³

The High Court will not interfere in revision with orders allowing or disallowing claims for rateable distribution,⁴ except in exceptional circumstances,⁵ as where there is a manifest error in the order under section 73.⁶ Revision.

Claims enforceable under the attachment cease to have effect on withdrawal of attachment.⁷ Where the assets are not liable to be rateably distributed, section 73 (2) has no application.⁸ Even

1. *Jagadish Chanara v. Kripanath*, (1908) 36 Cal. 130, distinguishing *Dayaram v. Govardhundas*, (1894) 28 Bom. 458; *Ramasamy v. R. G. Orr*, (1902) 26 Mad. 176.

2. *Shibdas v. Bulaki Mal*, (1927) 98 I.C. 884.

3. *Varada Ramaswami v. Umma Venkataramaya*, (1922) Mad. 99=67 I.C. 546.

4. *Bhagat Ram v. Mangat Ram*, (1921) 60 I.C. 371.

5. See *Ghisulal v. Todarmull*, (1922) Cal. 19=70 I.C. 539.

6. *Subramanian v. Ramaswami*, (1926) Mad. 179=49 M.L.J. 753.

7. *Mahomed Muzaffar Ali v. Bhagwati Prasad*, (1922) 8 O.L.J. 358=66 I.C. 642.

8. *Varada Ramaswami v. Umma Venkataraman*, (1922) Mad. 99=67 I.C. 546.

though the person aggrieved is the decree-holder the recovery is by suit and not by an application under section 47.¹

Under section 73 (2), C.P. Code,—“Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same any person so entitled may sue such person to compel him to refund the assets.” This section does not take away the power of Court to order a refund in the execution proceedings.² This does not contain any indication that an execution sale by virtue of which assets have been made available can be attacked in a separate suit. The cause of action under the section arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained.³ The cause of action does not arise until the money is actually paid over the person not entitled to recover the same; and a suit for recovery of a share of sale proceeds under this section, before actual payment to a person to whom they have been ordered to be paid, is premature and liable for dismissal.⁴

Such a suit is for money had and received and falls within Article 62 of the Indian Limitation Act and is not a suit to set aside the order of distribution covered by Article 13 of that Act.⁵ Article 62 mentions the starting point as “when the money is received” and this means actual receipt of the money or something equivalent to receipt of the

1. *Somasundaram v. Sundaresa Rao*, (1924) Mad. 97.

2. See *Parasuraman v. Viraraghava*, (1897) 7 M.L.J. 277.

3. *Lakshmichand v. Chaturbhuj*, (1922) 65 I.C. 230.

4. *Hart v. Hara Prasanna*, (1885) 11 Cal. 718; *Ramachandra v. Raghunath*, (1918) 46 I.C. 101.

5. *Saukar Sarup v. Mejo Mal*, (1901) 23 All. 313; *Vishnu v. Achut*, (1890) (1889) 1 Bom. L.R. 795. For a contrary view, see *Gauri Prasad v. Ram Ratan*, (1886) 13 Cal. 159.

money. So when a decree-holder was allowed a set off the person entitled to rateable distribution may sue within three years under this Article.¹ For such a suit the plaintiff can deduct under section 14 the period of time taken by a petition for revision in the High court.²

The law relating to delivery of possession of property decreed or sold has been well summarised by Freeman :—

Freeman on delivery.

“ Purchasers at execution sales, when their title becomes absolute by the expiration of the period allowed for redemption, succeed to the rights of the defendant in execution, and become entitled to the possession of the property purchased, if the defendant was so entitled. This possession, unless peaceably relinquished, must be recovered by due process of law. If the lands sold are vacant, no doubt the purchaser may take possession, if he can do so without any breach of the peace. But he is under no circumstances justified in taking forceable possession.

Purchasers under decrees in chancery are usually placed in possession of their property by an officer of the court, acting under a writ of assistance issued in the case in which the decree was entered. The circumstances in which this writ may properly issue, and the mode of proceeding to obtain its issuance, have already been considered. The power of courts of chancery to place purchasers in possession of the property purchased is conceded, provided it may be effectually exercised without assuming

1. *Vishnu v. Achut*, (1890) 15 Bom. 438. See *Devnarayan v. Chunnilal*, (1913) 41 Cal. 137 (141); *Rajkumar v. Fateh Bahadur*, (1917) 38 I.C. 525 ;

2. *Baijnath v. Ram Doss*, (1914) 39 Mad. 62.

Freeman on
delivery.

authority over persons or subject-matters not within the jurisdiction of the court. But if some person, not a party to the suit, was in adverse possession of the property when it was commenced, or has taken such possession since, without any collusion with any of the parties, as neither he nor his claim was before the court in the principal suit, the court will not assume jurisdiction over him or it, on application being made for a writ of assistance, but will leave the purchaser to pursue his remedy by some independent action. The court may also decline to grant a writ of assistance when the judgment debtor claims in good faith to have a title not capable of assertion in the former suit, under which he has a right to remain in possession. If, on the other hand, a party in possession has entered *pendente lite* under the defendant or by collusion with him, he may be dispossessed under this writ. The issuance of the writ cannot be resisted upon the grounds which ought to have been urged at some earlier stage of the proceedings, or which, if then urged were decided against the respondent.¹

An action to recover possession of the property purchased at an execution or judicial sale may be either against the judgment debtor and his successors in interest or against a person in no way connected with the title of such judgment debtor. Where he, or one succeeding to his title or possession, is the party resisting the right of the purchaser to recover, the defenses which he may interpose are very limited. He may show that the judgment under which the sale was made was void, and hence, cannot transfer any title or right of possession to the purchaser. A defence may also be successfully

1. Freeman on Executions, III. 1996.

made on the ground that the execution or any essential proceeding taken thereunder was void, but we shall not here undertake to consider what executions or proceedings are void to the extent of leaving a purchaser without title, for these matters have been, to a great extent, the subject of preceding chapters of this work. The judgment or execution may not have been void, but after the sale one or both may have been set aside by the court. If so, its action is usually restricted in its consequence to purchasers with notice of the irregularities inducing the action of the court.

Freeman on
delivery.

A judgment debtor or his successor in interest may avoid the recovery of possession by the purchaser by proving that, though the defendant had an estate or interest in the property, it was not subject to, or was exempt from, execution. A familiar instance of this is the holding of possessing under an equitable title, or as a mere tenant at will or by sufferance, and where such titles are not subject to execution, or that the judgment debtor held the naked legal title without having any beneficial interest therein. So the defendant may show that the property was a homestead, and, on that account, not the subject of an involuntary transfer, unless the sale is a judicial one, and the husband and wife were both parties to the decree directing the sale. The sale of exempt personal property under execution, where the right of exemption has not been expressly or impliedly waived, is also void, and the purchaser, therefore, may always be met with this defence, where the facts are sufficient to support it.

If the defendant in execution was in possession of the personal property sold, he must surrender

Freeman on
delivery.

such possession to the purchaser, and cannot avoid his obligation to do so by showing that his title was invalid, and that a third person is the true owner and entitled to the possession.

All persons who come into possession under the defendant in execution, after the lien of the judgment or of the levy has attached, hold rights subordinate to the lien, and can assert no defences against the purchaser which would not be equally available to the defendant in execution. If the defendant in execution continues in possession of the property, he is regarded as a tenant at will of the purchaser, and not as an adverse holder; nor can he claim against the purchaser the title or rights of an adverse holder until after he has given notice to the purchaser that he has assumed an attitude of hostility.¹

Writ of assistance is an order for possession under a decree. One may successfully resist an application for a writ of assistance, though he come into possession of the property after the commencement of the suit, if he is not in privity with the parties to the suit and did not act in collusion with some of them, as when he purchased *pendite lite* from one not a party to the suit, but who was in possession at its commencement, claiming adversely to the parties thereto, nor, as we understand the decisions, is it necessary that a purchase be shown from one in possession who is not a party to the suit. It is sufficient that an entry made *pendente lite* was not by connivance with any of the parties and was in good faith and under a claim of title on behalf of the person making such entry, or on behalf of one for whom he acted as agent.

1. Freeman on Executions, III. 1999-2002.

Courts are required to exercise and do exercise care ^{Freeman on delivery.} to protect persons entitled to a writ of assistance from the acts of third persons probably induced by collusion with a party who being no longer entitled to remain in power on his own account, seeks to deprive his adversary of the fruit of his victory by causing a stranger to take such possession and unless it is clear that he who entered *pendente lite* did so in good faith and without collusion a writ of assistance will issue against him.

If the defendant was in possession under a claim of right thereto of a character which could not be litigated in the suit in which the decree was pronounced and may therefore maintain the claim without disputing anything decided by the decree, a writ of assistance will not issue against him. Thus though he is a party to a suit to foreclose a mortgage, he may hold some adverse title not included in the mortgage and which under the practice prevailing cannot be asserted as a defence to such foreclosure.

The defence made to a writ of assistance cannot involve a relitigation of the matter necessarily determined by the decree, but it may properly include any matter not so determined, which shows that the party resisting has the right to remain in possession. It would perhaps be more accurate to state that if there is a claim of right not determined by the decree already rendered, the claimant will be left in possession and allowed to present a claim as a defence to some independent proceeding brought against him. In other words, the writ of assistance will be directed only in a clear case, and where the respondent cannot possibly have any rights which were not subject to the decree. If,

Freeman on
delivery.

for instance, he sets up and appears to claim in good faith a right to the possession derived from and under the purchaser or from the defendant prior to the commencement of the suit, the validity and effect of the claim will very rarely, and perhaps never, be tried upon the application for this writ but he will be left in possession. The writ has been denied when the purchaser had delayed for a long period of time to apply for it and also when the respondent had not intruded into the possession until sometime after the purchaser had received the deed. In the first case, the court presumed that the respondent might have acquired from the purchaser some right to possession and in the last case, the court, while admitting its duty to place a purchaser in possession by removing parties unlawfully withholding the property at the execution of the deed, did not conceive that this duty was so continuous as to require it to protect the purchaser from subsequent intrusion."¹

English law.

In England there is a distinction between a judgment or order to "recover possession" and a judgment or order to "deliver up possession" under Order 47, rules 1 and 2 of the Rules of the Supreme Court, that under the former, the judgment need not state any time for such recovery.² Although under the Rules a writ of possession is now substituted for a writ of assistance, whether between parties or as against strangers to the action, the Court has still power to order a writ of assistance to issue.³

1. FREEMAN ON Executions, I, 163-4.

2. See *Savage v. Bentley*, 90 L.T. 641;

3. See *Hall v. Hall*, 47 L. J. Ch. 680; *Wyman v. Knight*, 39 Q.D. 165.

In England under the writ *Fieri facias*, or *fi Fa.* *fa* the goods and chattels of the debtor are seized and sold for the satisfaction of a judgment or order for the recovery or payment of a sum of money. Under this writ it is the duty of the sheriff to seize and sell any goods which he has the power to seize to an amount reasonably sufficient, but not more than sufficient to satisfy the debt and his own expenses and after sale thereof and such satisfaction to pass over any residue to the judgment-debtor.¹ Where it appears upon the return of a writ of *feri facias* that the sheriff has seized but not sold away goods of the debtor, the creditor is entitled to sue out a writ of *venditioni exponas*, namely, to sell for the best price obtainable.²

Where the plaintiff seeks to recover the chattel without giving the defendant the option of retaining it by paying the assessed value, it is not necessary that the value of the chattel should be assessed. An order for the issue of a writ of delivery can be made without assessment.³ An assessment by agreement of parties is sufficient.⁴ After assessment of the value of the goods and damages (if any) the plaintiff has an alternative remedy. He may ask for the chattel or the value of costs and damages.⁵

Under the English Common Law by a writ of *Elegit*, *Elegit* the lands of the judgment-debtor are delivered to the judgment-creditor, to be held by him until

1. HALSBURY'S Laws of England, XIV. 37 *et seq.*; R.S.C., O. 43, R. 1; Daniel's Ch. Pr. 738-752; Chitty's Arch. Practice, 836-871; Mather's Sheriff Law, 56-121; Annual Practice (1923), 744.

2. Halsbury's Law of England, XIV 60; R.S.C., O. 43, R. 2; Chitty's Arch. Practice, 865-S; Mather's Sheriff Law, 146.

3. *Hymas v. Ogden*, (1905) 1 K.B. 246 C.A.

4. *Winfield v. Boothroyd*, 34 W.R. 501.

5. See R.S.C., O. 43, R. 1.

the satisfaction of the debt, but the writ does not provide or contemplate a sale. After obtaining delivery, the creditor may apply for an order for the sale of the debtor's interest in the land. Under the Rules of the Supreme Court a judgment or order for possession of land may be enforced by a writ of possession in manner, before the commencement of the principal Act (Judicature Act) in actions of ejectment in the superior Courts of Common Law; and a judgment for possession of property other than land or money may be enforced by a writ of delivery.¹

Under the C. P. Code, 1908,

Delivery of
moveables.

“(1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

Delivery of
debt.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the

1. HALSBURY'S LAW of England, XIV. 61 et. seq; Daniel's Chancery Pr., 760; Judgments Act, 1864 (27 and 28 Vic. c. 112); R.S.C., O. 55, R. 913; Annual Practice (1923), 752.

share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser."¹

"Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

Execution of documents.

(2) Such execution or endorsement may be in the following form, namely :—

A.B. by C.D. Judge of the Court of (or as the case may be) in a suit by E.F. against A.B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same ; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself."²

Under this rule a Court is empowered to cancel

1. C.P.C., O. 21 r. 79 (=Old Code, ss. 299-301).

2. C. P. C., O. 21 r. 80 (=Old Code, s. 302.) See Judicature Act, 1884, S. 14 ; For cases of execution of deeds in England, see *Re Edwards*, 33 W.R. 578 ; *Hoare v. Gray*, 31 Sol. J. 744. For cases of transfer of stock, see *Savage v. Norton*, (1908) 1 Ch. 290 ; *Re Spurling*, (1909) 1 Ch. 199.

a previous endorsement with a view to enable the auction-purchaser to realise the amount of a promissory note purchased at a court sale.¹

In England, in *Re Cathcart*,² the Official Solicitor was directed to transfer consols standing in the name of a lunatic; and in *Hood Barrs v. Cathcart*,³ the Court ordered the Bank of England to execute a transfer which the defendant had neglected to execute, giving the Bank leave to apply to discharge the order.

“In the case of any moveable property not herein before provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.”⁴ A purchaser of a promissory note in Court-auction who has obtained a vesting order before the date of his decree is entitled to a decree in a suit on the note even though there is no endorsement in it.⁵

Result of sale
of movables.

No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.⁶

1. *Netram v. R. N. Mudaliar*, (1911) 4 Bur. L.T. 318=21 I.C. 913.

2. (1893) 1 Ch. 466.

3. 39 Sol. Jo. 639.

4. *Ibid.*, r. 81 (=Old Code, s. 303.)

5. *Kuttalalingam v. Packiyam*, (1910) 21 M.L.J. 422=8 I.C. 17.

6. C.P.C., O. 21 r. 28 (=Old Code, s. 298).

A mortgagee of moveable property cannot follow the moveable property into the hands of an auction-purchaser.¹ Where in spite of the willingness of the judgment-debtor's creditor holding an insurance policy as security of his debt to pay in Court the balance of the amount after satisfying his debt, the executing Court ordered the policy to be sold by auction at the instance of the decree-holder and the policy was purchased by the decree-holder himself at a low price, it was held that the remedy of the other decree-holders claiming rateable distribution was to bring a suit for compensation and the sale could not be set aside.² In a sale of moveable property in execution of a decree there is no warranty of title whatever; all that is sold is the right, title and interest of the judgment-debtor and the real owner, if not the judgment-debtor, can bring a suit, to recover the moveable property or its value, against the debtor.³

“Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.”⁴

Delivery of property in the occupancy of judgment-debtor.

1. *Nachiappa v. Mahomed Sahir*, (1925) Rang. 303.

2. *Manak Chand v. Chheda Lal*, (1926) 97 I.C. 467. See *Amrit Lal v. Jagat Chandra*, (1926) Pat. 202=93 I.C. 935.

3. *Maung Pa v. Abdul Ganni*, (1926) 4 Ran. 202.

4. C. P. C., O. 21, r. 35 (=Old Code, s. 263).

Delivery of
property in
the occu-
pancy of
tenant.

“Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.”¹

Decree for
immoveable
property.

(1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be believed and the person in possession, being bound by the decree, does not afford free access, the Court through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any

1. G. P. C.. O. 21, r. 39 (=Old Code, s. 264).

other act necessary for putting the decree-holder in possession."¹

Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property."²

Delivery under that decree when in occupancy of tenant.

Where a decree for possession is sought to be executed or where immoveable property is sold by Court and the purchaser seeks for possession, possession thereof must be by delivery. Possession may be formal or symbolical or actual or physical. Actual or khas possession is delivered when the property is vacated of other claimants or occupants and the applicant is allowed by the officer of Court to get into it. Symbolical possession is a legal fiction³ and is effected by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the claim that the interest of judgment-debtor has been transferred to the purchaser.

Possession given by delivery actual or symbolical.

The Code provides for two cases where symbolical form may be given.

Symbolical delivery.

1. C. P. C., O. 21 r. 95 (= Old Code, S. 318).

2. C. P. C., O. 21 r. 96 (= Old Code, S. 319).

3. *Deo Nandan v. Uditnarayan*, 23 I.C. 298=18 C.W.N. 940 ; *Nidhi Ram v. Parasaram*, (1923) Lah. 693=74 I.C. 1 ; *Yusuf Ali v. Abbas Ali*, (1925) Lah. 264=84 I.C. 733.

Symbolical
delivery.

i. When the decree is for joint possession of immoveable property; and

ii. When the decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy.

The provisions of the Code as to how symbolical delivery is to be effected must be strictly complied with. Failure to affix a copy of the warrant for delivery of possession to the place vitiated the delivery.

Joint
possession.

The procedure for formal possession in the case of a decree for joint possession is new. Under the old Codes, difficulty was felt in executing decree obtained by a purchaser of the rights of a co-sharer for joint possession of the property with the other co-sharer¹ and it has been now obviated by this provision. Where a plaintiff is entitled to possession jointly with others, he can be granted a decree for joint possession whether he was originally in possession² and dispossessed or whether he had never been in possession.³ The competency of Courts to grant decree for joint possession has always been recognised and in enacting an ex-

1. *Rajani Kanth v. Ramnath*, (1884) 10 Cal. 244; *Ramchandran v. Dhamodhar*, (1896) 20 Bom. 467; *Krishnaj v. Vithu*, (1884) 18 Bom. 505; *Bhau v. Dadi Krishnaji*, (1897) 21 Bom. 777; *Watson & Co. v. Ram Chand*, (1891) 18 Cal. 10 P.C.; *Luchmeswar v. Manohar*, (1892) 19 Cal. 253; *Surya Narayana v. Hari Mohan*, (1906) 33 Cal. 120.

See also *Koonwar Bijoy v. Sharma Soonduru*, (1860) 2 W.R., Mis. 31; *Brahmo Moyu v. Rai Chunder*, (1860) 5 W.R. Mis. 15, *Ronee Sharma Sundaru v. Jardine Skinner & Co.* (1912) 7 W.R. 376. See Woodroffe on Injunction, 2nd Ed. p. 400.

2. *Bhairan Rai v. Saran Rai*, (1904) 26 All. 188.

3. *Jaganath v. Ram Phal*, (1912) 34 All. 150; *Phani Singh v. Nanab Singh*, (1906) 28 All. 161, contra.

press provision in rule 35 (1) the Code has not any way altered the law.¹ It follows therefore that the discretion vested in the Court,² to allow or refuse a decree for joint possession remains unaffected.³ One co-sharer is entitled to a decree for joint possession and declaration of his joint rights against the other co-sharers who have ousted him. He can have only symbolical joint possession as provided for by this rule as against the co-sharer in actual enjoyment.⁴ A purchaser of an undivided share however must only bring a regular suit for partition and possession of the share that may be allowed to the person whose interest he had purchased.⁵ Where property, of which possession is directed to be delivered to an auction-purchaser in execution sale, belongs to members of an undivided Hindu family, some of whom were not parties to the suit, and the purchaser applies to the Court to deliver the property to him free from obstruction, the property should be deemed to be in possession of the undivided members who cannot be dispossessed, in execution, of their interest. The case falls not under R. 97, but under R. 99 of O. 21 of the Civil Procedure Code and the petitioner's remedy is to sue for physical possession of the share of the judgment-debtors.⁶

1. Ibid.

2. See *Ram Charan v. Kauleshar*, (1905) 27 All. 153.

3. *Bholanath v. Buskin*, (1894) A.W.N. 127; *Rahman v. Salamat*, (1901) A.W.N. 48.

4. *Sarabjit v. Rai Kumar*, (1922) 44 All. 5.

5. *Yelumalai v. Srinivasa*, (1906) 29 Mad. 294. See *Mandavilla Ramarow v. Sivanarayana*, (1919) 9 L.W. 81 = 49 I.C. 629; *Harakh v. Gopi Kishun*, (1921) 89 I.C. 134.

6. *Rangaswami Aiyangar v. Rangaswami Aiyangar*, 14 I.C. 282.

Effect of
symbolical
delivery.

In cases where the Code directs delivery of symbolical possession and such possession is delivered, "in contemplation of law both parties must be considered as being present at the time when the delivery is made; the delivery thus given must be deemed equivalent to possession." Their Lordships referred to another conclusive test *viz.*, "if mesne profits are awarded to the plaintiff he is only entitled to them up to the time when delivery is given. This can only, of course, be explained on the ground that at that time the defendant's possession is considered at an end and the transfer to the plaintiff became complete."¹ In the course of the term of a lease A purchased a village and obtained possession by proclamation in 1890. When the lessor's successors sued for possession of the property on the ground it was trust, the suit was held to be barred under Art. 142 or 144, inasmuch as the purchaser was in possession of the village adversely from May 1890.² Therefore symbolical possession cannot affect the possession of, or give a start to a fresh period of limitation against, persons who are not parties to the suit or execution proceedings. It is operative only against the person who is a party to the suit or proceeding and is equivalent to a complete transfer of actual possession only as against him.³

But mere symbolical possession delivered at a time when a third party (not being the judgment-

1. *Juggoboudhu v. Ram Chunder*, (1880) 5 Cal. 584 F.B.; *Ranjit Singh v. Bunwari Lal*, (1884) 10 Cal. 993; *Juggobandhu v. Purnanund*, (1889) 16 Cal. 530 F.B. (overruling *Krishna Lal v. Radha Kishna*, (1884) 10 Cal. 402)

2. *Sowcar Sahanada Govindass v. Raja Venkata Perumal*, (1915) 27 M.L.J. 195=26 I.C. 537.

3. *Mr. Wazjiruddin v. Lala Devki Nandan*, (1907) 6 C.L.J. 472; *Harjiwan v. Shivram*, (1894) 19 Bom. 620.

debtor) is in possession such delivery is ineffectual as against the third party, and the continuity of his possession is not broken or interrupted by it. No fresh limitation therefore commences. The theory that when delivery is ordered against the defendant in possession, such delivery though symbolical must be deemed equivalent to actual possession as against the defendant, as in contemplation of law both parties must be considered as being present at the time when the delivery is made, but that consideration cannot arise against third parties who are no parties to the proceeding. "In all cases of delivery of possession of immoveable property, whether to the decree-holder or to an execution purchaser, the officer entrusted with the warrant of delivery proceeds to the spot and delivery of possession is effected on the land or at a spot near enough to command a view of the land with its boundaries (see Savigny on Possession, page 150), in the presence of the decree-holder or purchaser or their agent and generally in the presence also of several others, including village officers; and, after the delivery is thus effected, a receipt acknowledging delivery of possession and attested by witnesses is obtained and forwarded to the Court along with the return to the warrant. If the judgment-debtor be the party in possession, it is difficult to see what else has to be done to put the decree-holder or purchaser in actual possession. The officer of the Court, by effecting delivery as above indicated, puts the decree-holder or purchaser in actual possession of the land. If, however, the judgment-debtor be not the party in possession, but a third party is in possession, a delivery thus made in the absence of the third party and not hostilely to him cannot by

Symbolical
delivery
against third
party.

itself affect his possession nor amount to an ouster or dispossession of him, and his possession will continue uninterrupted. The delivery of possession, therefore, under any of the above sections cannot legally be characterised as symbolical or formal either as against the judgment-debtor in possession or against a third party in possession. If the judgment-debtor is in possession, such delivery operates as a delivery of actual possession. If a third party is in possession, it is no delivery of possession at all, as against him, if made in his absence and without his knowledge, but it is operative as an ouster or dispossession of him and placing of the decree-holder or purchaser in actual possession, if such delivery takes place in the presence of and adversely to the claim of such third party."² A suit might be brought and a decree obtained by a person who has neither title nor possession against another person who has neither title nor possession; and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner, who had been in actual possession for many years, and who was no party to the suit, it would operate most unjustly.³

In all cases therefore where the judgment-debtor is in possession of the property decreed or sold, actual possession must be taken. But suppo-

1. *Juggobundhu v. Ram Chunder*, (1880) 5 Cal. 584 F.B.; *Doyanidhi v. Kelai*, (1885) 11 C.L.R. 395; *Harjivan v. Shivram*, (1895) 19 Bom. 620; *Joggobundhu v. Purnanund*, (1889) 16 Cal. 530; *Nasiruddin v. Sayudur Rahman*, (1909) 19 C.L.J. 209; *Mir Wazizuddin v. Lala Deokinandan*, (1908) 6 C.L.J. 472; *Ramjan v. Chunder Mohan*, (1909) 7 C.L.J. 640; *Tasaduq v. Asgar*, (1918) 21 O. C. 70=45 I.C. 600;

2. *Kocherlakota Venkatakrishna Rao v. Vadive Venkappa*, (1906) 27 Mad. 262 (269).

3. *Runjit Singh v. Bunwari Lal*, (1884) 10 Cal. (995).

sing where actual possession must be delivered only symbolical possession is given, the High Courts differ in the legal effect of such delivery.

Symbolical delivery when actual delivery is due.

According to the Courts of Calcutta, Lahore and Patna there is no difference in the legal effect.¹ and the delivery of symbolical possession operates as actual possession against the judgment-debtor and his representatives ; there is no distinction here whether the person entitled to possession claims under a decree or a court-sale² and the defendant cannot rely on the plea of limitation based on his wrongful possession previous to execution. This principle avails also to persons claiming under certified purchasers.³ If the judgment-debtor remains in occupancy after formal delivery of possession, he thereby becomes a trespasser no less than if he were to vacate at the time and return the day after. And having thus become a trespasser, a fresh cause of action arises to the decree-holder who may thereupon sue for ejectment. The judgment-debtor has no ground for complaint in being thus twice sued ; he is bound to obey the decree, and if he continues in possession after execution he does so at his own risk.⁴ Accordingly therefore a suit by the auction-purchaser who had obtained symbolical possession of land, brought within 12 years from the date of symbolical delivery,

1. *Gunga Gobind v. Bhoopal Chunder*, (1873) 19 W.R. 101 ; *Umbica Churn v. Madhub Ghosal*, (1879) 4 Cal. 870 ; *Lokessur Koer v. Purgun Roy*, (1881) 7 Cal. 418 ; *Joggabundhu v. Ram Chunder*, (1885) 5 Cal. 584 F.B.

2. *Hari Mohun v. Bahno Ali*, (1897) 24 Cal. 715 ; *Joggo-bundhu v. Purnanand*, (1889) 16 Cal. 530 F. B. ; *Muste Dhapi v. Bartam Deo Pershad*, (1900) 4 C.W.N. 297.

3. *Bhuitu Beg v. Jatindra Nath*, (1923) Cal. 138.

4. *Shama Churn v. Madhub Chandra*, (1885) 11 Cal. 93 (102).

Symbolical
delivery
when actual
delivery is
due.

is governed by Article 144 of the Limitation Act and is not barred by limitation.¹

A contrary view has been taken in Madras, Bombay and Allahabad. Where symbolical delivery of immoveable property is given in execution it cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, if the judgment-debtor is in actual possession at the date of the delivery.²

In *Mahadev v. Janu Namji*,³ it was said by the Full Bench of the Bombay High Court, "symbolical possession is not real possession nor it is equivalent to real possession under C. P. Code except where the Code expressly or by implication provides that it shall have that effect. S. 264 and S. 319 of the Code of 1882 prescribed and impliedly gave effect, to symbolical possession under certain conditions, but symbolical possession was neither prescribed nor recognised by S. 263 or 318 of that Code or by the corresponding sections of the earlier codes. Therefore in Bombay delivery of formal possession of immoveable property to the purchaser cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same.

1. Ibid.; *Salanat Ali v. Ali Akbar*, (1920) 55 I.C. 648; *Maharaja Pratap v. Bhaiyani Sunderbans*, (1923) Pat. 76=76 I.C. 999; *Ram Krishna v. Emp.*, (1923) Pat. 197=66 I.C. 817; *Pandurang v. Sampat*, (1923) Nag. 237=72 I.C. 318; *Harbhagwan v. Taja*, (1926) Lah. 35.

2. *Jang Bahadur v. Hamvant Singh*, (1921) 43 All. 520; *Sardarkara v. Abdullah*, (1923) 71 I.C. 885; *Govindaswami v. Pethaperumal*, (1917) 44 I.C. 839; *Kamayya v. Bhimara Setti*, (1924) 49 M.L.J. 303=86 I.C. 439 [dissenting from *Govind v. Venkata Sastrulu*, (1907) 17 M.L.J. 598].

3. (1911) 36 Bom. 373.

This overruled the old view,¹ but in *Mahadevappa v. Bhima*,² the same High Court took a different view and said that the decision of the Privy Council in *Radha Krishna v. Ram Bahadur*³ meant that "symbolical possession is sufficient to interrupt adverse possession when the person setting up adverse possession was a party to the execution proceedings in which symbolical possession was given" and this decision throws a considerable doubt on the correctness of the Full Bench decision in *Mahadev's case*. Again on the effect of the said decision of the Privy Council, the Full Bench of the Allahabad High Court takes a view different from that of the Bombay High Court. Their Lordships say "The property in the case which was before their Lordships of the Privy Council was then in the occupation of tenants and possession had been delivered in accordance with the provisions of the law relating to delivery of possession in respect of such land. Their Lordships hold that such possession gave, as between the parties to the proceedings relating to delivery of possession, a new start for the computation of limitation."⁴ A similar distinction was made later in Bombay also.⁵

Symbolical delivery when actual delivery is due.

Delivery of possession has the effect of making the judgment-debtor a trespasser from that date. The auction-purchaser does not therefore commit any criminal act in going to assert his title and to

Effect of delivery.

1. See *Mahadev v. Parasram*, (1901) 25 Bom. 358 and *Gopal v. Krishna Rao*, (1901) 25 Bom. 275. See also *Lakshman v. Moru*, (1889) 16 Bom. 722; *Krishna Lal v. Radha Krishna*, (1884) 10 Cal. 402.

2. (1921) 46 Bom. 710.

3. (1917) 20 Bom. L.R. 502: "Their Lordships approved of the decisions in *Joggabandhu v. Ram Chander*, (1880) 5 Cal. 584." See also *Kamayya v. Mahalakshmi*, (1927) 53 M. L. J. 339 (case law reviewed).

4. *Jang Bahadur v. Hanwant Singh*, (1921) 43 All. 520.

5. *Shridhar Madhavrao v. Ganpati*, (1918) 43 Bom 559,

take possession of the purchased property by ousting the judgment-debtor. A rightful owner is entitled to turn out a trespasser, but can use no more force than is reasonable to defend his possession from a trespasser.¹ Every attempt should be made by the Criminal Court to maintain the auction-purchaser in possession of the property unless a clear right to possession is established in any other person.²

An auction-purchaser of Nankar rights acquires full title to them from the date of his purchase and is not required to apply for possession under rule 95.³

Fresh
application.

The failure of the decree-holder purchaser to take action under rule 97 is no bar to his putting in a fresh application for possession under rule 95 within the period of limitation allowed by Article 167.⁴ According to the Patna High Court, if the application of a decree holder or of an auction-purchaser for delivery of possession is rendered infructuous by reason of obstruction, the applicant is entitled to apply for a fresh writ of possession outside the period of limitation prescribed by Article 167 without making an application under rule 97 within the period of limitation.⁵

Appeal.

Order passed on an application for delivery of possession under rule 95 is appealable,⁶ according

1. *Ram Krishna v. Emp.*, (1922) Pat. 197 = 66 I.C. 817.

2. *Bhim Bahadur v. Emp.*, (1922) Pat. 265.

3. *Partab Das v. Kanhai Lal*, (1916) 3 O. L. J. 436 = 36 I. C. 768.

4. *Abdul Karim Sahib v. Timmaraya Chetty*, (1214) 24 I. C. 512; *Muthia v. Appasami*, (1890) 13 Mad. 504.

5. *Raghunandan v. Ramcharan*, (1919) 4 Pat. L. J. 94 = 41 I.C. 150 F.B.

6. *Kailash Chandra v. Gopal Chandra*, (1926) 53 Cal. 781 F.B. See *Rukmani v. Narasurdha*, (1921) 41 M. L. J. 54 = 63 I.C. 730; *Haji Abdul Gound v. Raja Ram*, (1916) Pat. L.J. 232 = 35 I.C. 468 F.B.; *Buddhu v. Bhagira'hi*, (1918) 40 All. 216.

to Calcutta and Madras and not according to Allahabad and Patna. No suit lies from an order passed under this rule.¹

Under Article 180 of the Indian Limitation Act, Art. 180. 1908, an auction-purchaser may apply for delivery of possession under rules 95 and 96 within three years from the date when the sale becomes absolute. This date is the date of the confirmation of the sale,² not the date when the certificate is issued. This latter meaning was given in some cases under the Act of 1877, where the residuary Article 179 (present Art. 181) was applied.³ An application by a decree-holder purchaser for delivery is not an application to execute the decree and is governed by Article 180,⁴ because a direction for delivery of possession is no part of the decree.⁵ It makes no difference that the sale was confirmed before 1908, if the application for delivery was made after the Limitation Act of 1908 came into force.⁶ The fact, that during the period of three years an order for delivery had been passed but delivery was not effected owing to his own default, does not extend the period of limitation.⁷

In computing the period of limitation under Article 180, the time taken by an application under

1. *Pachaiyappa v. Venkatachariar*, (1925) Mad. 1198=90 I.C. 952.

2. *Ranjit Singh v. Baldeo Singh*, (1908) 30 All. 390.

3. *Barsappa v. Moryt*, (1879) 3 Bom. 433; *Houmontarao v. Subaji*, (1884) 8 Bom. 257; *Kashinath v. Dunning*, (1893) 17 Bom. 228;

4. *Sultan Sahib v. Chidambaram*, (1908) 32 Mad. 136.

5. *Ramaswami v. Abdul Aziz*, (1916) 3 L. W. 191=32 I.C. 993;

6. *Hussain Bux v. Bedhb*, (1915) 27 I.C. 420.

7. *Sri Raja Valuva Visvasundararao v. Vannam Paidigadu*, (1926) Mad. 385=90 I.C. 485;

Art. 180.

rule 90 will be deducted, as the sale will be deemed to become absolute when such application is rejected, but the time during which a suit to set aside the sale on rejection of the application under rule 90 is pending cannot be deducted.¹ Except where the exemption is claimed on the ground of concealed fraud under section 18, the time cannot be extended by the Court, on the ground of hardship, though the conduct of the plaintiff's party is dishonest.² Where a sale was confirmed without opposition on 26-4-1913 and on an application made on 3-1-1914 to set aside the sale on the ground of fraud and the sale was set aside on 25-6-1915 in regard to a part of the properties sold, it was held that an application for delivery made on 17-2-1917 was in time, as time should be computed from the date of the order disallowing the petition to set aside the sale on the ground of fraud and not from the date of the first confirmation.³ Where an application by the decree-holder auction-purchaser under rule 95 for possession was stayed by an order of Court in an application to set aside the ex-parte decree and by an injunction in a subsequent suit to set aside the decree, and after the suits terminated in his favour he applied for possession, it was held that the new application was one for revival of the earlier one and Article 180 could not therefore apply and even if the Article were applicable the sale could be said to have become absolute only on the termination of

1. *Sernam Pillai v. Thiruvazhi Perumal*, (1926) Mad. 857 = 96 I.C. 657;

2. See *Janak Prasad v. Set Ram*, (1914) 22 I.C. 497.

3. *Muthu Korakki Chetty v. Mahomed*, (1920) 43 Mad. 185 F. B.; *Baijnath v. Ramgut Singh*, (1896) 23 Cal. 775 P. C.

the other proceedings.¹ Where after a sale in Art. 180. execution in favour of a decree-holder was confirmed in 1908, a compromise was come to in 1909 on appeal against the decree, whereby the judgment-debtor was to pay a certain sum in instalments and on regular payments in time the sale was to be set aside, but the judgment-debtor paid nothing and when in 1912 the decree-holder applied for delivery, it was contended that being more than 3 years from date of confirmation in 1908, the application was out of time; it was held that the agreement between the parties had the effect of suspending the confirmation till the occurrence of the default, that the judgment-debtor could not be heard to say that the confirmation was complete in 1908, inasmuch as if the decree-holder had applied for possession before the default occurred, he could not have obtained relief and that the time during which the application for a sale certificate made by the decree-holder after default was pending on account of the judgment-debtor's objections should not count against the decree-holder.²

“(1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property he may make an application to the Court complaining of such resistance or obstruction. Resistance or obstruction to delivery.

(2) The Court shall fix a day for investigating the matter and shall summon the party against

1. *Thayyammuthu v. Adyappan*, (1927) M.W.N. 60=99 I.C. 632. See also *Nambur Subbaya v. Rajah Venkatramayya Appa Rao*, (1918) M.W.N. 214=13 I.C. 155.

2. *Jank Prasad v. Set Ram*, (1911) 22 I.C. 497.

Resistance or
obstruction to
delivery.

whom the application is made to appear and answer the same.”¹

An application under rule 97 cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in obtaining delivery; that after either the delivery has been ordered by the court or at any rate, an attempt to obtain possession has been made by the decree-holder out of Court. An application under rule 95 asking for possession against a person alleged to be holding the property on behalf of the judgment-debtor is not necessarily an application complaining that resistance or obstruction has been offered by such a person.²

Though rule 97 contemplates the Court ordering the investigation after the bailiff has been obstructed in giving possession in terms of the decree, the Court can anticipate an obstruction and order investigation under that rule.³

In rule 97, there is no reference to the present obstructor, but only to the person obstructing or resisting execution. The rule therefore is not inapplicable, according to the Madras High Court, to a case when the obstructor was not actually present.⁴ But a different view is taken in Rangoon.⁵

The resistance and obstruction contemplated by rule 97 is some overt act of resistance or obstruction to the delivery of possession by some person who was present at the time. When a person who is in possession and is interested in obstructing the

1. C.P.C., O. 21, R. 97 (=Old Code, Ss. 328-334).

2. *Bohra Sobha Ram v. Tursi Ram*, (1924) 46 All. 693.

3. *Maung Po v. Nandiya*, (1925) Rang. 374.

4. *Banjoisi Narasamma v. Sarasamma*, (1926) Mad. 353= 98 I C. 61 (a decree under Section 9 Specific Relief Act is within this rule).

5. *Bose v. O. R. Choudhury*, (1924) Rang. 261.

delivery is absent at the time of the delivery, his suit for recovery of possession need not be instituted within one year as prescribed in Article 11 A.¹

“Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation to be detained in the civil prison for a term which may extend to thirty days.”²

Resistance by judgment-debtor.

An order passed under rule 98 against a decree-holder auction-purchaser is not appealable according to the High Court of Calcutta,³ and is appealable according to the High Courts of Patna and Madras.⁴

“Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.”⁵

Resistance by a stranger.

“(1) Where any person other than the judgment-debtor is dispossessed of immovable property

1. *T. C. Bose v. O. R. Choudhry*, (1924) Rang. 261=82 I.C. 865.

2. *Ibid.*, R. 98 (=Old Code, ss. 329-330).

3. *Surentranath v. Satyendranath*, (1926) Cal. 985=92 I.C. 544.

4. *Askaram v. Rajhunnath*, (1925) 4 Pat. 726; *Meyyappa v. Meyappan*, (1921) M. W. N. 698=66 I. C. 722. See *Rukmani v. Narasimha*, (1921) 41 M.L.J. 54=63 I.C. 730.

5. *Ibid.*, R. 99 (=Old Code, ss. 331-335).

by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same."¹

"Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property."²

"Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."³

Rule 98 has to be read along with rule 95 and it is applicable to cases of obstruction by the purchaser from the judgment-debtor after attachment, he being the representative of the judgment-debtor within the meaning of section 47.⁴ Rule 98 gives jurisdiction to the Court to direct possession to be given only if it is satisfied that the obstruction was by the judgment-debtor or by some other person at his instigation.⁵

1. *Ibid*, r. 100 (=Old Code, s. 332.)

2. *Ibid*, r. 101 (=Old Code, ss. 332, 335.)

3. *Ibid*, r. 102 (=Old Code, s. 333.)

4. *Kuppana Goundan v. Kumara Goundan*, (1910) 34 Mad. 450.

5. *Secretary of State v. Chenukr & Narayanan Unni Fisherodi*, (1915) 31 I.C. 799.

For the purpose of rule 98, a purchaser *pendente lite* is a person bound by the decree and comes with the definition of "judgment debtor"¹ and a purchaser under a simple money decree is a representative of the judgment-debtor.² The word "judgment debtor" which includes his representative, the word "representative" being taken to mean all persons who are bound by the decree.³ The purchaser of the whole of a non-transferable occupancy holding is not a representative of the judgment-debtor.⁴ Nor are co-sharer landlords who are not parties to the execution—proceedings.⁵

"Judgment-debtor."

When under some private arrangement between them and their co-sharers, the judgment-debtors are in exclusive possession of certain specific plots, a purchaser of the right, title and interest of the latter who obtains symbolical possession of the plots of lands through Court is entitled to be placed in actual possession of that plot. A transferee from such execution-purchaser, therefore, is entitled to possession as against the judgment-debtor and to claim compensation for wrongful use and occupation by the latter.⁶ Section 331 of the Code of 1882 applied only where the resistance or obstruction had been occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account

1. *Golam Nabi v. F. W. Needham*, (1925) Cal. 1243=85 I.C. 1004.

2. *Manicka v. Parasuram*, (1920) M.W.N. 787=59 I.C. 894.

3. *Maharaja Pratap v. Sunderbans Koer*, (1923) Pat. 76=71 I.C. 999.

4. *Purnachandra v. Manobini*, (1927) 53 Cal. 913. For the purchaser of a portion, see *Doss Muhammad v. Majid*, 95 I.C. 146.

5. *Sudarshan v. Biraja Sundari*, (1917) 38 I.C. 388.

6. *Ghuran Rai v. Kali Prasad*, (1927) 102 I.C. 446.

or on account of some person other than the judgment-debtor. When Government grants a patta for land it ceases to have possession of any kind whatsoever, and the fact that charge is made for jenmabhogam in addition to the assessment does not affect the matter; and consequently the Government is not entitled to come in under rule 99.¹

Co-owner.

The Court must be satisfied that the possession actual or constructive was not of the judgment-debtor. In Bombay, it was held that a member of a Hindu joint family could not say that he was in possession of any particular portion of the property of the family on his own account, his possession being only the possession of the family.² But in Nagpur, it has been however held that a claimant who has an interest in the land of which possession has been delivered in execution of a decree, as a member of a joint family or otherwise, if he is affected by the delivery, can claim to be in possession on his own account within the meaning of this rule,³ and in Patna it has been said that a person who is in joint possession along with another can be said to be in possession on his own account.⁴

A claimant who has an interest in the land of which possession has been delivered, either as a member of the family or otherwise and who is affected by the delivery of possession, as he is himself in possession, is really a person who is in possession in respect of his own interest though

1. *Karunakara Menon v. Secretary of State for India*, (1911) 21 M.L.J. 407=8 I.C. 857.

2. *Cooverji v. Dewsy*, (1893) 17 Bom. 718.

3. *Miss A.K. Singh v. Ram Prasad*, (1923) 18 N.L.R. 206=68 I.C. 394.

4. *Ram Kishun v. Damodar Prasad*, (1924) Pat. 506=83 I.C. 599.

joint with the judgment-debtor, and he can, consequently, claim to be in possession of the property on his own account within the meaning of rule 100. His joint interest with the judgment-debtor cannot prevent him from claiming in good faith in respect of his own interest. The effect of an order in favour of the claimant will be to place him in joint possession with the execution-purchaser.¹

In *Jafferji v. Miyadin*,² the Bombay High Court held that a sublessee of the sub-tenant was not entitled to obstruct the original landlord who had a decree against the lessor of the sub-tenant, as there was no privity of contract between the landlord and the sub-tenant, though the sub-tenant might be entitled to protection against his immediate lessor. But the Calcutta High Court said, that where a lessee subleased premises against a covenant not to sublet and the lessor obtained a decree against the lessee for ejectment, the lessee's remedy, if he is resisted by the sublessee, is to sue for possession and not to apply under rule 97.³

If a claimant was in possession though without a good title or even as a trespasser but on his own account or on account of some person other than the judgment-debtor he must succeed under rule 101.⁴ The purchaser *pendente lite* of property who pays off a prior mortgage thereon is entitled to be protected in his possession because he initially

1. *Radha Gobinda Misser v. Ragunath Misser*, (1913) 18 C.L.J. 138=20 I.C. 253.

2. (1922) 46 Bom. 526; see also *Jairam v. Nowroji*, (1922) 46 Bom. 887.

3. *Ezra v. Gubbay*, (1921) 47 Cal. 907.

4. *Muni Lal v. Sasi Bhusan*, (1927) 98 I.C. 541.

Dispossession
necessary.

obtained it from the prior mortgagee, the equity of subrogation being entirely in his favour.¹

An application under rule 100 lies only if a person other than the judgment-debtor is *dispossessed*. If, for instance, a person complains that a delivery alleged to have been actually made to a purchaser was not real and he was himself not actually disturbed from possession and asks the Court to cancel the fictitious delivery, the parties must be left to assert their right elsewhere and the Court has no jurisdiction to act under this rule. A similar rule applies to the purchaser also: In *Ibrahim Sahib v. Konammal*,² the return on a warrant for delivery of land in execution of a decree for possession was that the delivery was complete and the statement was accepted by the decree-holder. The decree-holder applied again for removal of obstruction by a lessee, whose lease he said he was not aware of, and if necessary, for the issue of a warrant of delivery. It was held by the Madras High Court that the execution was definitely closed by the delivery on the first application accepted by the decree-holder as complete, and a second application by him for execution was in the absence of any allegation of fraud in the proceeding on the first application, incompetent.

Suit under
rule 103.

"Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit (if any), the order shall be conclusive."³

1. *Mt. Fatima Khanam v. Nawab Raja Ali*, (1926) Oudh. 610.

2. (1923) 43 M.L.J. 179 = 78 I.C. 755.

3. C. P. Code, O. 21, r. 103 (=Old Code, ss. 332, 335).

It may be useful to compare the language of the C.P. Codes of 1882 and 1908, in Section 283 and Order 21 Rule 63 relating to claims against attachment and in Sections 332 and 335, and Order 21 Rule 103 relating to obstruction to delivery. Under Section 283 the expression was, "the party against whom an order *under Sections 280, 281 or 282* (now O. 21 rr. 60, 61 or 62) is passed may institute a suit to establish the right which he claims." Under Order 21 Rule 63, now, the expression used is "the party against whom *an order is passed*." On account of this change in the language, it has been held under the present Code, *any order* is conclusive whether made on investigation or not.¹ Under Section 332 of the C. P. Code of 1882, and under Order 21 rule 103 of the present Code the expression used is the same, namely, "against whom an order is passed *under.....*". The result is that all rulings under the C. P. Code of 1882 on section 283 will be applicable to the interpretation of this rule 103 and the effect of the change noticed in Order 21 rule 63 will not be a guide.

No change in the law.

Rules 97 to 103 contemplate that the decision in favour of a party, not being a judgment-debtor, under r. 99 is conclusive so far as the question of possession is concerned, unless and until a suit is brought, by the party against whom the order is made, under rule 103, and such a suit must be brought within one year from the date of the order.²

Order when conclusive.

To make the order conclusive, it must have been made under rule 98, 99 or 101. If the order is not one made *under those rules*, rule 103 will not

1. See page 228 *supra*.

2. *Chail Behari Lal v. Kidar Nath*, (1919) 1 Lah. 57.

Order when
conclusive.

apply.¹ The order must have been made on investigation. When the Court declines to pass an order, thinking it better that the purchaser should be referred to a separate suit to enforce his purchase, the order is not conclusive.² When a purchaser applied for the removal of obstruction, but withdrew his application and the application was dismissed, the order was not conclusive.³ It would be otherwise if instead of withdrawal of the application, the applicant offers no evidence or insufficient evidence or is absent.⁴ Where there was no judicial determination whether the obstruction did, as a matter of fact, exist or whether the obstruction was justifiable and the Court without an inquiry dismissed the application for default and the proceedings were withdrawn, the order was not conclusive.⁵

The order made under rule 101 may be one granting or refusing the application for removal of obstruction.⁶ When an order is made, though ex parte, the remedy is by suit under rule 103 and not by appeal or application for restoration under Order 9 rule 13.⁷ If a Court erroneously entertain an appeal, the High Court can interfere in revision.⁸

1. *Sobha Ram v. Tursi Ram*, (1924) 46 All. 693; *Bargo Lal v. Chander*, (1923) Lah. 145=69 I.C. 55.

2. *Meerudin v. Rahimsa*, (1903) 27 Mad. 25.

3. *Bhikka v. Sakarlal*, (1881) 5 Bom. 440.

4. See *Karsan v. Ganpatram*, (1897) 22 Bom. 875.

5. *Sarat Chandra v. Tarim Prasad*, (1907) 34 Cal. 491; *Kunj Behari v. Kandhu*, (1908) 6 C. L. J. 362; *Wamandhar v. Kamta Prasad*, (1926) Nag. 423=97 I.C. 178.

6. *Zipru v. Hari*, (1918) 42 Bom. 10.

7. *Ibid.*; *Haricharan v. Manmathanath*, (1913) 41 Cal. 1; *Peary Lal v. Brij Mohan Das*, L.R. 5 All. 291 Rev.; *Kaliakkal v. Palmi*, (1926) Mad. 412=92 I.C. 533; *Mt. Fatima v. Nawab Roza Ali*, (1926) Oudh. 610.

8. *Bai Mani v. Ranchod Lal*, (1923) Bom. 214=72 I.C. 256; *Sheoraj v. Banwari Das*, (1884) 6 All. 172; *Sabhajit v. Sri Gopal*, (1894) 17 All. 222.

During the pendency of execution proceedings for the sale of certain properties mortgaged, the mortgagor leased out his lands for 40 years. The mortgagee purchased the property in auction sale and applied under O. 21, r. 97 for possession of the same. The Court below held that the leases were collusive but declined to interfere with the possession of the lessee and ordered it to be proclaimed that the interest of the mortgagor had been transferred to the auction-purchaser. It was held that the order of the lower Court was one dismissing the application of the decree-holder under O. 21, r. 99 and that the auction-purchaser who was a party other than the judgment-debtor against whom an order had been made under O. 21, R. 99 had no right of appeal but that his remedy was to institute a suit against the occupiers for their ejectment.¹

Order when conclusive.

Where an order is passed under rule 101 and a suit is not filed in one year contesting its validity, it becomes final. The fact that there was a pending suit regarding the title to the property in which he had set up his title does not absolve the party against whom the order was passed from the obligation under rule 103; the doctrine of *lis pendens* does not apply to an application for declaration of title as in such a case there is no transfer of any right.²

Suit within a year.

The suit contemplated by this rule is by a person who is kept out of possession and who claims possession under his purchase. It does not concern

Nature of suit.

1. *Mussammatt Bibi Saidunnissa v. Faiyaz Hussain*, (1919) 53 I. C. 923.

2. *Kumaran v. Kunhikrishnan*, (1924) M.L. 602=75 I.C. 814.

itself with any other cause of action which such person apart from his character as auction-purchaser may have against the defendant. The rule does not bar suits on other causes of action. The scope of the suit is the same whether the order is made under rule 98, 99 or 101. The suit is not only concerned with the question of possession at the date of the order but also with the right to possession. An unsuccessful claimant will be entitled ordinarily to succeed on his showing the fact of possession on the date of the order, if the decree-holder fails to prove a subsisting title in him. A decree-holder may establish his right to the present possession by showing his subsisting title to the property without proving actual possession at the date of the order.¹

Nature of suit.
Second application for delivery.

There is nothing to prevent a decree-holder or purchaser who has been obstructed or resisted in his attempt to get possession of the property decreed or purchased from making a fresh application for delivery without making a complaint under sections 328, and 334 of C.P. Code.² The period of limitation governs a cause of action arising out of a particular resistance or obstruction,³ and does not extend to complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder.⁴ An application for removal of

1. *Unni Moidin v. Pocker*, (1920) 44 Mad. 227; *Nabadwipendra v. Madhusudan*, (1912) 16 I.C. 741.

2. *Muthia v. Appasami*, (1890) 13 Mad. 504; *Muthusami v. Ethirajulu*, (1912) M.W.N. 179=16 I.C. 432.

3. *Ramasekara v. Dharmaraja*, (1882) 5 Mad. 113; *Balvant v. Babaji*, (1884) 8 Bom. 662.

4. *Narain Das v. Hazari Lal*, (1895) 18 All. 233; *Baranagore Jute Factory Co., v. Rajkumar*, (1909) 13 C.W.N. 724=1 I.C. 785.

a second obstruction though made after 30 days after an acquiescence in an earlier one is not barred by Article 167.¹ So it has been said in Patna that an auction-purchaser not being a decree-holder, who made an application for delivery of possession and failed by reason of obstruction is entitled to make an application for a fresh writ of possession within the period of limitation allowed for such an application without applying under rule 97.² A different view was taken in Bombay and the Punjab and in a case in Allahabad.³

Second application for delivery.

Delivery of possession may be made upon an application under rules 95 or 96 within three years from the date when the sale becomes absolute (under Art. 180). If on an application for delivery the purchaser is obstructed, he may make an application for removal of the obstruction under rule 97 within 30 days of such obstruction (under Art. 167). Without an application for delivery or for removal of obstruction the purchaser may bring a suit. If the judgment-debtor was in possession at the date of the sale and no possession is obtained, a suit for possession must be brought within 12 years from the date of confirmation of sale under Art. 138. If the auction-purchaser obtain symbolical possession and the judgment-debtor was then in possession, the suit will be in

Summary of procedure.

1. *Meyyappa Chetti v. Meyyappan*, (1921) M. W. N. 698=66 I.C. 722.

2. *Raghunandan v. Ramcharan*, (1919) Pat. 81=49 I. C. 150 F.B.

3. *Vinayakrav v. Devrao*, (1887) 11 Bom. 473; *Kesrinarain v. Abdul Hasan*, (1904) 26 All. 365; *Ghulam v. Hassan Din*, (1910) P.W.R. 45=6 I.C. 649; *Har Nihal v. Shamji Mal*, (1910) P. R. 14=5 I.C. 809.

Summary of
procedure.

time if brought within 12 years from the date of such possession. If the symbolical possession were taken as equivalent to actual possession, in that case the defendant's continuance after such symbolical possession can be said to the virtual dispossession and in that sense Art. 144 will apply.¹ If on the date of the sale or on the date of the symbolical possession the judgment-debtor is out of possession and a third person is there, the suit will fall under Art. 137, as symbolical possession is of no avail against one not a party to the suit. It is incumbent on the plaintiff to prove whether or not the judgment-debtor was in possession at the date of the sale. But when the decree-holder is himself the purchaser, opinion is divided whether he can only proceed by way of application. If a person is wrongly dispossessed he may apply for restoration under rule 100 within 30 days of the date of dispossession (under Art 165).²

If the decree is for possession, the decree-holder must apply for delivery and it will be executed under rules 35 and 36.³

Until that course is taken, the decree is yet unsatisfied and no fresh suit can lie. If, on the other hand, the decree-holder is obstructed in taking possession by a third person, he is not bound to pursue his remedy under rule 97. "No doubt he might have been so proceeded against, but the language of the Code in S. 328 (r. 98) is that

1. *Kamayya v. Mahalakshmi*, (1927) 53 M. L. J. 339. See *Rajendro Kishore Singh v. Bhagwan Singh*, (1917) 39 All. 460, where the judgment mentions no article, but in the headnote articles 138 and 144 are mentioned.

2. See *Nasiruddin v. Sayudur Rahman*, (1914) 19 C.L.J. 209 = 23 I. C. 811.

3. *Madhusudam v. Gobindapria*, (1899) 27 Cal. 34.

the decree-holder *may*, not that he *must*, proceed in the way indicated and the similar language of the Code (VIII of 1859) having been construed by the Courts to leave an option to the judgment-creditor to proceed either summarily or by regular suit, the present Code is to be construed in the same sense, unless a different one is plainly intended. Either method having been available to the plaintiff it is not sound objection that he has preferred a suit as the more convenient way of pursuing his right."¹

Summary of procedure.

If however he proceeds under rule 97 and an adverse order is passed, he will have to file a suit within one year under Art. 11 A.

This is a summary remedy provided by the Code, which is in effect an action of ejectment against a stranger without the expense of a regular suit. Under the Code of 1882, S. 331, the application was registered as a suit and the rights of the parties had to be decided as if an ordinary suit for possession was instituted by the decree-holder against the defendant, and Art. 138 or 144 would have applied.²

If the complaint is time-barred, an objection on that ground can be taken when an appeal is preferred against the final order on the complaint.³

Art. 165.

The Court has no discretion to enlarge the period of limitation fixed by Article 165 and 167 Section 6 of the Limitation Act has no application

1. *Balvant v. Babaji*, (1884) 8 Bom. 602 (608).

2. *Namdev v. Ramachandra*, (1894) 18 Bom. 37; *Koonamrelli v. Unnara v. Kunhi Raman*, (1924) 44 M.L.J. 443 (448).

3. *Lala v. Narayan*, (1895) 21 Bom. 392.

to such cases and time is enlarged therefore by reason of the applicant's disability.¹

Art. 181.

Article 165 is applicable only to applications under O. 21 R. 100 of C. P. Code and an application by the judgment-debtor for restoration of immoveable property seized by the decree-holder in excess of the decree, falls under Section 47 C. P. Code and is governed by Article 181.²

Art. 137.

Article 137 applies to suits brought by purchasers against third persons in possession of lands in whose favour limitation runs against the purchaser in the same way as it would run against the owner with whose right the purchaser is clothed and the judgment-debtor was out of possession at the date of sale.³ For the application of this Article there are two requisites : (i) the judgment debtor must have been out of possession at the date of the sale, and (ii) the suit must be against third parties, not against the judgment-debtor or his representatives.⁴ In *Khiroda v. Krishna Das*,⁵

1. *Ratnam Ayyar v. Krishna Doss*, (1898) 21 Mad. 499; *Vinayakrav v. Devrao*, (1887) 11 Bom. 473.

2. *Vachali Rohini v. Kombi Aliassan*, (1919) 42 Mad. 753, [overruling *Ratnam Ayyar v. Krishna Dass*, (1898) 21 Mad. 494]; *Sharfu v. Mir Khan*, (1919) 1 Lah. L. J. 230; *Abdul Karim v. Islamunnissa*, (1916) 38 All. 339 dissenting from *Har Din Singh v. Lachman Singh*, (1900) 25 All. 343; and *Raja Ram v. Rani Itraj Kunwari*, (1914) 17 O. C. 94.

3. See *Lakshman v. Bisan Singh*, (1891) 15 Bom. 26; *Lakshman v. Maru*, (1892) 16 Bom. 722; *Ram Prosad v. Laxhi Narain*, (1886) 12 Cal. 197.

4. On the application of these principles, the correctness of the Article applied, for instance, in *Namdev v. Ramchandra*, (1894) 18 Bom. 37; *Lakshman v. Baisan Singh*, (1891) 15 Bom. 26; and *Nasiruddin v. Sayudur Rahman*, (1914) 19 C. L. J. 209 = 23 I. C. 811 is open to question. For an extraordinary difference of opinion, see *Jnanendra v. Umesh Chandra*, (1922) Cal. 544.

5. (1910) 12 C. L. J. 318 = 6 I. C. 467; *Brojendra Kumar v. Asutosh*, (1922) 26 C. W. N. 364 = 70 I. C. 420.

the suit was against a third party but the judgment-debtor was in possession at the date of the sale. The first condition was not satisfied and Article 144 was applied. In *Ram Lakhan v. Gajadhar*,¹ a third party was in possession but the suit was against the judgment-debtor who afterwards obtained possession. The second condition did not apply and Article 144 was applied.

Article 137 does not apply to a purchaser at a sale held in execution of a mortgage decree.²

Article 138 applies to a suit against the judgment-debtor or his representative when the judgment-debtor was in possession at the date of the sale. There are two requisites: (i) judgment-debtor must have been in possession at the date of the sale and (ii) the suit must be against the judgment-debtor or his representatives.³ It applies as well to suits by assignees from an auction-purchaser, as to suits by the auction-purchaser himself.⁴ In Calcutta it has been held that a suit by decree-holder auction-purchaser against a person who has not obtained title from the judgment-debtor is not governed by Article 138,⁵

1. (1910) 33 All. 224.

2. *Tanjore Palace Estate v. Thiyaajaraja Pillai*, (1923) Mad. 160.

In *Srinivasa v. Vellayan*, (1926) Mad. 966. it was held Article 137 or 138 applied. In *Bhagmal v. Sita Ram*, (1926) 96 I. C. 173, it was held that the purchaser must institute a suit within 12 years from the date where sale became absolute and any question of adverse possession in favour of a person holding against him was irrelevant.

3. *Bhagwant Singh v. Bholi Singh*, (1913) 35 All. 432 ; *Gopal v. Krishna Rao*, (1900) 25 Bom. 275 ; see also *Hari Krishna v. Venkata Lakshmi Narayana*, (1910) 34 Mad. 402.

4. *Govind v. Gangaji*, (1898) 23 Bom. 246 ; *Sati Prasad v. Joseph Chandra*, (1904) 31 Cal. 681 F. B. overruling *Mohima Chunder v. Nobin Chunder*, (1895) 23 Cal. 49.

5. *Janki Nath v. Baikunt Nath*, (1922) Cal. 176.

Arts. 137 and
138.

and this Article applies only to cases where the purchaser has not obtained possession.¹ In *Gopal v. Krishna Rao*, Ranade, J., said "Articles 136, 137 and 138 refer to cases where no possession, formal or actual, had been obtained through the Court. Article 136 applies to a private purchaser from a person not in possession. Article 137 applies to an auction-purchaser of the rights of a person not in possession, while Art. 139 applies where the auction purchase is made of the rights of a judgment debtor who is in possession at the date of the sale. None of these Articles contemplates the case of an auction-purchaser or his assigns who has obtained formal possession, and disturbed by the judgment-debtor or his heirs who continue in actual possession."²

In *Hussan Ammal v. Ismail Moideen*,³ Seshagiri Iyer, J., said "The language of Article 144 is more comprehensive and would cover all cases where adverse possession is set up. Although it is true that Article 144 being the residuary article should only be resorted to where there is no specific provision in the other Articles of the Act, it seems to me that the two articles (138 and 144) would overlap each other, unless the earlier one is confined in its operation to suits against judgment-debtors alone and the latter made to apply to other cases of adverse possession."

When in execution proceedings, the decree-holder got possession of the property though not through the court officer, but was subsequently dispossessed by the judgment-debtor, a suit to recover

1. *Brojendra Kunwar v. Asutosh*, (1922) 20 C. W. N. 364=70 I. C. 420.

2. (1900) 25 Bom. 275 (280).

3. (1915) 28 M. L. J. 642=29 I. C. 976.

possession is maintainable and will be governed by Article 142.¹

Where a purchaser of immovable property at court-sale who is resisted by the judgment-debtor or his tenants applies for delivery, the procedure is uncertain. Where the purchaser is a stranger he may apply for the removal of the obstruction and delivery of possession, under Order 21, rule 95 and if he fails, institute a regular suit for possession. But where the decree-holder is himself the purchaser the view is divided. In *Madhusudan Das v. Gobinda Priya*,² the learned judges of the Calcutta High Court said, "Proceedings for the delivery of possession are, we think, proceedings in execution of the decree. They undoubtedly are so when the decree is for possession, as the proceedings are necessary in order to give effect to the decree and any question which arose as to the land which the decree-holder was entitled to get under the decree would certainly be a question relating to the execution of the decree. The matter is not so clear when possession has to be given of land which has to be sold in execution of the decree. It may be said that the decree is fully executed when the sale is confirmed and that questions thereafter arising between the auction-purchaser and the judgment-debtor or others in connection with the delivery of possession of the property sold are not questions affecting the execution of the decree. They may not affect it in the sense of impeaching the sale, but where the law provides for the delivery

Procedure where decree-holder is purchaser.

Calcutta.

1. *Rup Chand v. Allah Jannaya*, (1922) Lah. 459 = 68 I. C. 744.

2. (1899) 27 Cal. 34 ; see also *Hari Charan v. Man Mohan*, (1913) 18 C. W. N. 27 = 20 I.C. 874 ; *Lachusa v. Matherlal*, (1918) 44 I.C. 533.

Procedure
where decree-
holder is
purchaser.

Madras.

Ram Narain
v. Bandi
Pershad.

of possession to the auction-purchaser by proceedings which form a part of the proceedings in connection with the execution of the decree, any question arising as to the kind of possession to which he is entitled is, we consider, a question relating to the execution of the decree within the meaning of section 244."¹ In *Kasinatha v. Uthumansa*,² it was said in Madras that, being a party to the decree, the decree-holder did not cease to be a party simply because he happened to be also the auction-purchaser and an application by him to be put in possession of the land purchased was an application relating to the execution of the decree. The same view has been followed in the Central Provinces.³

In *Ram Narain v. Bandi Pershad*,⁴ the facts are more interesting. In December 1887 B obtained a mortgage of 5/16 share in a village. In November 1890 R obtained a mortgage of $\frac{1}{4}$ of the aforesaid share in the same village. In March 1894 B obtained a decree for sale on his mortgage, but did not make R a party to his suit. In December 1897, R instituted a suit on his mortgage making B a party to the suit. In the meantime B caused the property to be sold and himself purchased it and the sale being confirmed, got delivery of possession in November 1898. R got a decree for sale in

1. See also *Sariatolla v. Raj Kumar Roy*, (1900) 17 Cal. 709 712.

2. (1901) 25 Mad. 529; *Kattumat Pathumay v. Raman*, (1902) 26 Mad. 740; *Sadhu v. Huisain*, (1904) 28 Mad. 87; *Muthia v. Appasami*, (1889) 13 Mad. 504; *Chokkalingam v. Chidambaram*, (1920) 12 L.W. 273=34 I.C. 367; *Mathonkandi Kannan v. Thayyil Pukkutti*, (1927) 50 Mad. 403. See also *Krishna v. Sarasvatula Sambasiva*, (1908) 31 Mad. 177.

3. *Lachusa v. Matheralal*, (1918) 44 I. C. 568; *Balaji Kashinath v. Anandrao*, (1927) Nag. 294.

4. (1904) 31 Cal. 737.

December 1898 and himself purchased the fourth share mortgaged to him. Subsequently after R was put in possession ousting B, B applied to the Court executing the decree, but under Sections 144 and 335 of the Code of 1882, to restore him to possession and got an order. In the first appellate court the respondent formally withdrew his application so far as it referred to Section 144 and asked for interference of the Court under Section 244 of that Code. The District Judge then thought that the remaining application was only under Section 335 and no appeal lay. On special appeal, the High Court said that the nature of the application ought to be considered with reference to the relief sought and the parties before the Court and a party cannot be permitted to oust the jurisdiction of the Court by a mere statement that his case is under one section of the Code of Civil Procedure and not under another and thereby defeat the just rights of the other party when in fact the matter may and ought to be dealt with under the other section. The present case might come within the provisions of Section 335 of the Code, but Section 244 is wider in its scope in some respects and authorises an enquiry into the question of possession, when the question arises in a proceeding between the parties to a suit and their legal representatives. The appellant was the plaintiff in the suit on his mortgage, the respondent was one of the defendants and the question for decision related to the execution of the decree passed on it."

*Ram Narain
v. Bandi
Pershad.*

This rule barring a separate suit applies not only to the parties to the suit, but their representatives in interest. So an assignee from a decree-holder purchaser must proceed to take delivery

only by an application under this section.¹ Where the obstructor is a representative of the judgment-debtor, it makes no difference for the application of this rule, that he claims the property not through the judgment-debtor, but adversely to him.²

Contrary view elsewhere.

A contrary view was taken by the majority of the Full Bench at Allahabad in *Bhagwati v. Banwari Lal*.³ Banerji J. said "All auction-purchasers whether they are decree-holders or not and whether they purchased under the mortgage-decree or a under a simple money-decree for money are in the same position as regards recovery of possession of the property purchased by them and that it is only in their capacity as auction-purchasers that they can obtain possession. The question therefore which arises under sections 318 or 319 of the Code of Civil Procedure is not a question between the parties to the suit or their representatives and cannot be determined under section 244. In the present case the plaintiff cannot at all be regarded as the decree-holder. The decree itself was never assigned to her. It was the property sold by auction which was transferred to her by gift by the auction-purchaser. Under the transfer she acquired no interest in the decree itself and in no sense can it be said that she is the holder of the decree or the representative

1. *Sandhu v. Hussain*, (1904) 28 Mad. 87; *Muthia v. Appasami*, (1890) 13 Mad. 504. See also *Dwar Buksh v. Fatik Jali*, (1899) 26 Cal. 250; *Kasinatha v. Uthumansa*, (1901) 25 Mad. 529.

2. *Punchanan v. Rabia Bibi*, (1890) 17 Cal. 711 F.B.; *Madhusudan Das v. Gobinda Prasad*, (1899) 27 Cal. 34; see also *Ishan Chunder v. Beni Madhub*, (1897) 24 Cal. 62.

3. (1909) 31 All. 82 (99) F.B.; *Budhu v. Bhagirathi*, (1918) 40 All. 216; *Tej Pal v. Tara Singh*, (1914) 24 I.C. 93; *Itraj Kuar v. Raja Ram*, (1915) 27 I.C. 570.

in interest of the decree-holder *qua* the decree. Even therefore if it be assumed that a distinction exists between the case of a decree-holder purchaser and other purchasers, though in my judgment no such distinction exists, that distinction cannot be held to apply in the present suit. I am further of opinion that a question between the auction-purchaser or his representative and the judgment-debtor or his representative relating to delivery of possession is not a question 'relating to the execution, discharge or satisfaction of the decree' within the meaning of section 244, clause (c). Upon the judgment-debtor's property being sold and the amount due under the decree being realized the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined. Whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and does not in any way affect it. If the decree-holder purchases the property but does not obtain possession, that circumstance would not entitle him to take out execution of the decree, which has already been satisfied. So long as the sale subsists he cannot claim a refund of the purchase-money or ask for execution of the decree to the extent of the amount of the purchase-money. It is only when an auction sale has been set aside under Section 310 A, 312 or 313, that the purchaser may under Section 315 obtain a refund, but he is not entitled to a refund if he fails to obtain possession of the property sold. In this respect also the position of the decree-holder-purchaser is not different from that of any other purchaser. It is said that an auction sale is not complete until possession has been delivered to the auction-

Contrary view elsewhere.

Contrary view
elsewhere.

purchaser. I see no warrant in the Code of Civil Procedure for such a view. Under Section 314, a sale becomes absolute as soon as it is confirmed, and under Section 316 the property vests in the purchaser from the date of confirmation of sale. The purchaser may no doubt obtain delivery of possession by an application under Section 318 or 319, but the validity of the sale or the completion of it does not depend on his obtaining possession. I am also unable to hold that if the decree-holder happens to be the auction-purchaser the property purchased by him may be regarded as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase-money for which the property was sold and it is the amount of this purchase-money which the decree-holder obtains as the fruits of the decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase-money, and he may do so, either in cash or by setting it off against the amount of his decree."

This view has since been approved in Oudh in Burma by the High Courts of Patna, Lahore and in many cases in Calcutta and recently in Bombay.¹

1. *Haji Abdul Gani v. Raja Ram*, (1916) 1 Pat. L. J. 232=35 I. C. 468; *Dharninder v. Bakhli*, (1918) 3 Pat. L. J. 571=48 I. C. 129; *Sridhar v. Jageshwar*, (1919) 4 Pat. L. J. 716=52 I. C. 74; *Seru Mohan v. Bhagvan*, (1884) 9 Cal. 602; *Iswar v. Jai Narain*, (1886) 12 Cal. 169; *Kishori Mohun v. Chunder Nath*, (1887) 14 Cal. 644; *Bhimaldas v. Ganesha*, (1897) 1 C. W. N. 658; *Mahomed v. Habib*, (1904) 6 C. L. J. 749; *Sasi Bhusan v. Radhanath*, (1915) 19 C. W. N. 835=25 I. C. 267; *Panchanan v. Sukhamoy*, (1919) 50 I. C. 299; *Chottha Ram v. Mt. Karmon*, (1918) P. R. 8=44 I. C. 169; *Nasrat Ali v. Sakina Begam*, (1919) P. R. 121=53 I. C. 460; *Tejpal v. Tarasingh*, (1914) 24 I. C. 93; *Kaniz Mehdi v. Rasul Beg*, (1919) 5 O. L. J. 551=48 I. C. 39; *Maharaj v. Jagannath*, (1911) 14 O. C. 70=10 I. C. 714; *Kanjan v. Arup*, (1916) 18 O. C. 345=33 I. C. 367; *Goba Nathu v. Sakharam*, (1920) 44 Bom. 977 (dissenting

Where a decree-holder who is also the auction-purchaser is resisted in trying to obtain possession not only by the judgment-debtor but by a stranger also, the remedy is by suit for possession both against the judgment-debtor and the stranger and Section 47 is not a bar to the suit.¹

The question is very important, for the relief for actual possession is shortened under the former view and lengthened under the latter. If the decree-holder happens to be the purchaser, he will under the former view have only 3 years to apply for possession and that by way of application in execution, while under the latter he will have full 12 years for a suit for possession under Article 138 from the date when the sale becomes absolute. There is much to be said in favour of the view of the majority of the Full Bench at Allahabad and apart from the legal principles on which the decision was based, it is but equitable, that a decree-holder, because he happens by accident² to be the purchaser, must not be placed in a position worse than that of a stranger. To avert this inconvenience, decree-holders are often tempted to resort to benami purchases in execution-sales which often lead to endless litigation. In fact doubts were expressed everywhere,³ though respect for *stare decisis* intervened in the way of a correction. In *Sultan Saheb v. Chidambara*⁴ it was said "an application by the

Bar of suit :
importance of
the question.

from *Sadashiv v. Narayan*, (1911) 35 Bom. 452; *Mi Ah Kook v. Mi Bla Mo Way*, (1921) 11 L.B.R. 17=64 I. C. 61 (assignee from decree-holder).

1. *Goba Nathu v. Sakharan*, (1921) 44 Bom. 977.

2. See *Sabharwal v. Sri Gopal*, (1894) 17 All. 222.

3. *Sandhu v. Hussain*, (1914) 28 Mad. 87; see also *Kattayat Pathumy v. Raman*, (1902) 26 Mad. 746. *Mahabir v. Macnagten*, (1889) 16 Cal. 682; *Madhusudan v. Govinda Pria*, (1894) 27 Cal. 34

4. (1908) 32 Mad. 136.

decree-holder for delivery of possession of property purchased in execution is not in strictness an application for execution of the decree; a direction for delivery being no part of the decree and though we may be bound by a number of decisions to hold that such an application raises a question relating to the execution of the decree, it does not follow that it is an application for execution. To hold that it is an application for execution might involve injustice. In a case, for instance, like that decided in *Basapa v. Mirya*¹ an application, though made within three years of the sale-certificate, would, if Article 179 is applicable, have to be held barred by limitation under that article, if not made within three years of the next preceding application to take a step in aid of execution and so it might happen that in a case where, in execution, a sale is held, say eleven years after the date of the decree, an application for possession made within three years of the sale certificate would, with reference to Section 230 C. P. C., have to be rejected as barred by limitation if it is to be treated as an application for the execution of the decree.”²

Remedy of
judgment-
debtor.

If in execution of a decree a person who was a party to the suit is deprived fraudulently of his property, his remedy is by application under section 47, not under O. 21, r. 100, and not by suit.³

If the property was in fact attached and sold, the judgment-debtor's only remedy as a party to

1. (1879) 3 Bom. 433.

2. *Lachmi Narain v. Rebali Debya*, (1925) Pat. 376 = 86 I. C. 648; *Piary Lal v. Ram Chandra*, (1920) All. 730 = 96 I. C. 771. See *Ishan Das v. Parmanand*, (1927) 6 Lah. 544.

3. *Jainulabdin v. Krishna Chettiar*, (1921) 41 M. L. J. 120 = 63 I. C. 200; *Vallabha Valia v. M. Kovilukath*, (1925) Mad. 1133; *Rajaratnam v. Sheik Hasanbi*, (1926) Mad. 968 = 97 I. C. 1031.

the suit would be under Section 47 C. P. Code and not by a separate suit. But if the property was not included either in the sale proclamation or in the sale certificate and was not in fact purchased at the auction sale, but was wrongfully taken possession of by the purchaser under color of a title which he did not possess, no question arises within Section 47 and the period for recovery of possession will be 12 years for dispossession.

Remedy of judgment-debtor.

In *Kanhairam v. Kalicharan*,¹ the Judicial Commissioner of Nagpur said that where of two judgment-debtors one only was proceeded against in execution proceedings as being the sole owner of the property sold in auction, a suit by the other judgment-debtor against the auction-purchaser after the auction-sale for recovery of the property is maintainable and Section 47 is not strictly applicable in such a case.

In *Mt Bavia Bibi v. Kasim Husain*,² a person who obtained a decree for possession did not execute it, but in execution of another decree obtained symbolical possession. Some years later, he applied for mutation and when that was refused, he sued again for possession. It was held that the refusal of mutation gave him a fresh cause of action and the suit was maintainable.

1. (1926) Nag. 68.

2. (1926) Oudh 263 = 91 I. C. 19.

INDEX

AGRICULTURIST, 132

ALIENATION

avoidance of, 213

private, 212

leave for private, 230-8

contrary to attachment, 214

AMBASSADORS, 69

ANNULMENT OF SALES, 610 et seq.

under inherent powers, 669

for want of saleable interest, 676

for fraud, 610

for material irregularity, 610

under O. 21 r. 90, 610

who can apply for, 611

'interests affected by the sale', 612-6

grounds outside rule, 627

application for, 610

form of, 633

parties to, 633

notice on, 634

appeal on, 635

before confirmation, 639

limitation for, 653

by suit, 660

ARREST, 42 et seq.

English and Indian law, 43

notice before, 44

warrant for, 45

procedure in, 47

entry into dwelling house for, 47, 52

mode of, 49

ARREST (Contd.)

- force in making, 51
- time for, 52
- discretion in, 55
- cancellation of, 57
- discharge from, 77
- release preliminary to insolvency, 61

See EXEMPTION

ASSETS, 851-4

- court holding, 847
- realised, 851
- instances of, 854-6

ATTACHABLE PROPERTY, 84

- “Saleable”, 87
- money deposited as security, 90
- price of pre-emption, 91
- compensation for acquisition of land, 91
- cheques, 92, 107
- shares and stocks, 92
- ship, 93
- crop, 103
- debt, 104
- real property, 121
- actionable claim, 138
- property of society, 173
- property beyond control of judgment-debtor, 117
- railway property, 102
- goods, 93
 - subject to pledge, 92
 - with servant or agent, 93
 - inchoate interest in, 95
 - under conditional sale, 97
 - under hire-purchase, 99
 - in transit, 100
 - of partnership, 101

ATTACHING CREDITOR

- rights of, 210
- representation of, 211

ATTACHMENT

- and sequestration, 81
- exemptions from, 84
- in India, 82
- foundation of, 174
- forms of, 82
- mode of, 174
- seizure, 82
- charging order, 83
- proclamation, 83
- garnishment, 33
- of debt, 104
- of naked title, 129
- of profits, 129
- of immoveables, 191
- of moveables, 176
- of debts, shares &c., 184
- of agricultural produce, 182
- of joint interest, 185
- of salary of public officer, 185
- of property in custody of Court, 187
- of property on the person of the judgment-debtor, 177
- of decree debt, 188
- of decree for money, 190
- of negotiable instruments, 191
- of coins etc., 192
- dormant, 217
- ultra vires*, 220
- claims enforceable under, 220
- cessation of, 192
- on satisfaction of decree, 192
- on insolvency, 193
- on judicial sale, 193
- on decree-holder's default, 194
- on "striking off", 196
- effect of, 208
- revival of, 203
- jurisdiction in, 26

ATTACHMENT (Contd.)

objections to, 264-8

Court bound to order, 264

*AUCTION, 432**AUCTION-PURCHASER*

what passes to

in mortgage decrees, 716

in sale of impartible estate, 708

of widow's estate, 701

of joint family property, 699, 704

of Mahamadan estate, 709

in cases of insolvency, 710

general rule and exceptions, 690

as affected by right of residence, 708

as affected by lis pendens, 762-7

tacking of possession of, 712

vesting of title of, 713

representation of, 767

right to trees, 714

to contribution, 728

to partition, 705

to possession, 724

to rent and profits, 713

to redeem, 718, 719, 728

sum payable, 732

liable for rent, 715

rival, 718

*BENAMI PURCHASES, 769-779**BID, 434*

leave to, 445

BIDDER, 434

capacity of, 442

CAVEAT EMPTOR, 693

history of rule, 694

present law, 696

CERTIFICATE

of deficiency of price in resale, 473

CERTIFICATE (Contd.)

- of sale, 499, 684
 - amendment of, 500
 - stamp for, 501
 - registration of, 501
 - date of, 507
 - effect of, 684-8
 - value of, 505

CHARGING ORDER, 397

CHEQUES, 109

CLAIM

- by parties to suit, 264
- by stranger, 268
- investigation of, 269-299
 - extent of, 287, 298
- limit of time for, 274
- who can, 278
- evidence of, 280
- against garnishment, 281
- order on
 - when conclusive, 293-9
 - when not, 301
 - confined to possession, 290
 - binds only parties, 304
 - when binding on judgment-debtor, 307-9
 - does not bind auction-purchaser, 318
 - after-acquired property, 306
- rejection for delay, 292
- appeal, 292
- revision, 292
- suit after, 331 et seq.

COLLECTOR

- execution by, 375

CONFIRMATION

- of sale, 481
- effect of, 491
- appeal against, 487
- suit to set aside, 487

CROPS, 835

DEBT, 104

 certain, 105

 beyond jurisdiction, 108

 recoverable by judgment-debtor, 109, 117

 contingent, 113

 due by insurance companies, 114

 on mortgage, 118

 due by judgment-creditor, 119

 due by co-judgment-debtor, 120

 in suit, 120

 actionable claim, 138

DEFAULT, 194

 “striking off,” 196

 effect of, 196

DELIVERY

 of debt, 876

 of moveables, 876

 of immoveables, 880

 in occupancy of tenant, 880, 881

 „ of judgment-debtor, 879

 summary of procedure, 405-908

 symbolical and actual, 881

 symbolical, 881-4

 effect of, 884, 889

 against third party, 885

 against judgment-debtor, 889

 when actual delivery is due, 887-9

 appeal, 893

 application for, 891

 limitation, 891

 fresh application for, 890, 905

 resistance to, 893

 by judgment-debtor, 895

 by stranger, 895

 suit after

 limitation for, 908 et seq.

 bar of, 917

DELIVERY (Contd.)

redelivery

to stranger,

to judgment-debtor, 918

DEPOSIT

of 25 %, 463

failure to, 464, 554

of full price, 467

forfeiture of, 469

under O. 21 r. 89, 588

not liable for rateable distribution, 59

See REDEMPTION OF SALES

DETENTION, 65

effect of, 67

subsistence allowance, 63

DOCUMENTS

execution of, 33

DWELLING HOUSE, 47, 52

outer door, 55

inner door, 54

EQUITABLE EXECUTION

origin of, 355

what it is, 351

mode of

by appointment of manager under old law, 357

by appointment of receiver now, 358

by transfer of execution to collector, 376

by charging order, 397

ESCAPE, 56

retaking after, 56

ESTOPPEL

basis of, 804

defined, 780

in common law, 781

in India, 781

by record, 781

in execution, 783

orders final, 784

ESTOPPEL

- orders not final, 790
- of judgment-debtor, 792
- of decree-holder, 805
- of auction-purchaser, 850

See RES JUDICATA

EXECUTION

- application for, 2
 - oral, 2
 - written, 2
 - contents of, 2
 - verification of, 4
 - for attachment of moveables, 6
 - of immoveables, 5
 - amendment of, 6
 - court's duty on receipt of, 8
- defined, 1
- practice in 1-41
- arrest in, 42 et seq.
- attachment in, 81 et seq.
- equitable, 355 et seq.
- sales in, 407 et seq.
- termination of, 837 et seq.
- mode of, 15
- irregular, 817
- wrongful, 817 et seq.
- concurrent, 16
- simultaneous, 16
- at Common Law 42
- applicability of, to
 - O. II, r. 2, 239
 - O. IX, 40
 - O. XXII, 40
 - O. XXIII, 39
- notice before, 10, 49

EXECUTION OF DEEDS

- decree for, 32

EXEMPTION

- from arrest
 - under agreement, 67
 - on public grounds, 68
- from attachment, 85, 87

FRAUD

- in sale, 623

GARNISHMENT, 205

- objection to, 281
- defences against, 283
- order on, 285

IMPROVEMENTS, 760

INJUNCTION, 396

- decree for, 25

INJURY, 628

- direct evidence of, 630

IRREGULARITY

- material, 617
- immaterial, 623
- in sale of moveables, 462

JUDGMENT

- void, 513
 - without jurisdiction, 513
 - foreign, 515
 - against dead person, 515
 - without representatives, 516
 - against minors, 517
 - against lunatics, 520
 - on unsanctioned compromises, 519

JURISDICTION

- limited to territorial limits, 244
- exception to rule, 246
- of Small Cause Court, 252
- judgment without, 513
- on transmission of decree, 522
- in cross-decrees, 624

LACHES, 643

LEAVE TO BID

effect of, 446

absence of, 457

MODE OF EXECUTION

in arrest, 49

decree for money, 21

for specific performance, 25

for specific moveables, 24, 876

for restitution of conjugal rights, 25

for injunction, 25

for land, 880

MOVEABLES

attachment of, 176

sale of, 462

NOTICE

under O. XXI r. 16, 539

r. 22, 10, 49

r. 32, 552

of sale, 430

OBSTRUCTION

to delivery, 893

POUNDAGE, 681*PRECEPTS*, 19*PRIVILEGE*

of woman, 68

public officer, 68

ambassadors, 69

Governor-General etc., 70

Member of Council, 70

Judges, 71

clergymen, 70

parties to action, 71

counsel, 74

witnesses, 74

limits of, 76

waiver of, 76

PROCESS

issue of, 12

return of, 15

PROCLAMATION

- of sale, 418
- contents of, 410
- settling, 410
- appeal, 429
- contents of, 422
 - time, 422
 - place, 423
 - particulars of property, 424
 - encumbrances, 424
 - value of property, 423
 - fresh, 457
 - waiver of, 458
 - mode of, 419

PUBLIC OFFICER, 150

PURCHASE-MONEY

- in case of moveables, 462
- of immoveables, 463-7

See DEPOSIT

RATEABLE DISTRIBUTION

- appeal, 866
- revision, 867
- wrong, 868
- suit on, 868-9
- in case of set off, 846
- under s. 73, C. P. Code, 844
 - object of, 845
 - scope of, 845
 - conditions for, 847
 - application for execution, 847
 - court holding assets, 849
 - assets realised, 851
 - before receipt of assets, 856
 - decrees for payment of money, 858
 - mortgage decrees, 859
 - against the same judgment-debtor, 860-4
 - in case of sale of property subject to mortgage, 864

REAL PROPERTY, 121

- lands, 122
- interest of co-tenant, 122
 - of mortgagee, 123
- held under contract of sale, 123
- contracted to be sold, 124
- pending confirmation of sale, 126
- lease holds, 127
- tenures, 128
- other interests in, 128

RECEIVER

- appointment of, 358
- remuneration of, 373
- security from, 373
- appeal against order appointing, 375

REDEMPTION OF SALES, 573 *et seq.*

- under O. XXI r. 89, 573
 - change in the law, 579
 - who can apply, 577
 - coheirs, 580
 - alienees, 580
- formality dispensed with, 602
- application for, 573
 - limitation for,
 - form of, 587
 - forum for, 586
 - parties to, 600
 - deposit for, 588
 - date of, 583
 - of 25 %, 594
- amount of, 594
- bar of, 598

RE-SALE, 466

- deficiency on, 471
- certificate of, 473
- procedure in, 475
- setting aside, 477

RES JUDICATA, 782 et seq.

constructive, 796

RESIDENCE, 709

RESTITUTION

of conjugal rights, decree for, 25, 31

RIGHT, TITLE and INTEREST, 699

SALE

voluntary and involuntary, 407

judicial and execution, 416

subject to mortgage or not, 734, 802

without notice

under O. XXI r. 16, 539

„ r. 22, 539

„ r. 32, 532

without attachment, 549

without legal representative, 551

of stranger's property, 568

to incapacitated persons, 560

of exempted property, 563

of property, 562

contrary to O. XXXIV r. 14, 555

contrary to statute, 567

against public policy, 568

after reversal of decree, 569

confirmation of, 481

what passes in, 689

redemption of, 573

annulment of, 610

irregularity in sale of moveables, 642

*See REDEMPTION OF SALES, ANNULMENT OF
SALES, RESALE, AUCTION-PURCHASER,
CERTIFICATE, PROCLAMATION.*

SALE IN EXECUTION

jurisdiction of court in, 416

of property under attachment by two or more
courts, 416, 425

of attached decree, 528

SALE IN EXECUTION (Contd.)

- application for, 422
- notice of, 430
- proclamation of, 418
- condition of, 431
- adjournment of, 456
- stopping of, 559
- of agricultural produce, 460
- of negotiable instruments, 461
- under Pub. Dem. Rec. Act, 538
- under Oudh Land Act, 532
- for court-fees not due, 532
- after stay, 535
- after satisfaction, 536
- must conform to decree, 528
- without leave to bid, 457
- with leave to bid, 446

SATISFACTION

- of decree, 837
- certification of, 839
 - by decree-holder, 840
 - by judgment-debtor, 841

SEIZURE, 204, 834*SELLING OFFICER*, 433, 531*SIMULTANEOUS*, 16

- execution, 259

SPECIFIC PERFORMANCE, 25*STRANGER*

- auction-purchaser protected, 571

SUITS

- to set aside order on claim,
- to confirm sale, 670
- to set aside sale, 658, 660
- to set aside decree, 668
- bar of, 649
- again claim order, 322
 - parties to, 336

SUITS (Contd.)

- valuation, 342, 351, 354
- issue in, 341
- burden of proof, 340
- limitation, 332
- alternative remedy of, 331
- no need if attachment is raised in one year, 324-7

TERMINATION OF EXECUTION, 837 et seq.

See Rateable distribution, delivery, satisfaction.

UNATTACHABLE PROPERTY

- exempted property, 85
- wearing apparel, 130
- tools of artizans, 131
- property of agriculturist, 132
- right to sue for damages, 133
- right of personal service, 140
- personal contracts, 141
- executory contracts, 142
- personal rights, 143
- stipends, etc., 146
- political pension, 146
- private pension, 149
- allowances of offices, 149
- pay of native army, 152
- provident fund, 157
- future maintenance, 166
- property in custody of law, 170

UNCERTIFIED PAYMENT, 842*VOID AND VOIDABLE SALES*, 510 et seq.

See *SALE*

WAIVER

- of privilege, 76
- of defect in proclamation, 458, 641
- as creating estoppel, 807

WARRANT

- validity of, 13, 45 et seq.

*WRIT**ca sa*, 43*fi fa*, 875*eligit*, 875

of possession, 874

of assistance, 872, 874

valid and invalid, 45

WRONGFUL EXECUTION, 817 et seq.

and irregular, 817

explained, 818

malicious arrest and attachment, 819

before judgment, 820

summary remedy for, 820-3

remedy of suit, 823

after judgment, 824

arrest, 825

detention, 827

attachment, 828

damages for, 827, 829-32

action for, 828

defence to, 832

limitation for, 832

SUPPLEMENT

VOL. II

S. 50. A decree for injunction can be executed against the son of the judgment-debtor as his legal representative [(1931) Bom. 280 : 133 I. C. 244; (1931) Bom. 482 : 134 I. C. 968; 55 Bom. 709].

'Dies' means natural and not civil death [53 All. 529].

An application to substitute legal representative can also be made to the court to which decree has been transferred for execution. [(1931) All. 320 : 133 I. C. 609. See however 11 Pat. 445].

For a decree against wrong legal representative, see (1933) Lah. 380 : 141 I. C. 580.

S. 57. For appointment of receiver in execution, see (1931) Oudh 307 : 132 I. C. 349 ; 35 C. W. N. 1066 : (1930) Cal. 159 : 126 I. C. 45 ; 57 Cal. 964; (1933) Sind 231.

Appointment of a receiver stands on the same footing as an attachment (1930) Mad. 4.

For High Court's jurisdiction to appoint receiver by way of equitable execution, see 57 Cal. 964.

S. 52. On the duty of the legal representative to account for the assets of the deceased, see (1930) Lah. 204 : 125 I. C. 187; (1930) Lah. 332 : 129 I. C. 885 : (1934) Lah. 106, 101.

For the need for a suit to follow assets in the hands of a legatee, see 58 Cal. 170.

A dismissal of a suit against a son as a partner does not preclude his being added as a legal

representative in execution [(1931) Sind 84 : 134 I. C. 386]

Rents and profits of immoveable property are assets [137 I. C. 632; (1932) Lah. 313 : 137 I. C. 25]

On onus of proof, see (1933) Lah. 447.

S. 53. For the scope of S. 53, see (1931) All. 766 : 133 I. C. 910, (1931) Sind 84 : 134 I. C. 386 ; 32 Bom. L. R. 919 : 127 I. C. 507.

For decree executed against sons and grandsons, see (1932) Bom. 522 ; 11 Pat. 445.

O. 21 R. 6. Omission to send certificate of non-satisfaction does not affect jurisdiction, (1931) Cal. 649 : 134 I. C. 944.

O. 21 R. 7. Executing court cannot question the validity of decree, 9 Pat. 829 ; 9 Rang. 480 ; 61 M. L. J. 520 ; (1931) All. 689 ; (1933) Cal. 380 : 137 I. C. 375 ; (1932) Lah. 500 : 138 I. C. 336 ; 11 Pat. 94. See (1934) Oudh 75 F. B.

O. 21 R. 11. Failure to specify mode of execution [(1932) Lah. 534 : 138 I. C. 249] ; mention of a wrong date [(1931) Sind 160 : 134 I. C. 1182] or wrong date given in the decree drafted by court (56 C. L. J. 185) ; omission to state names of persons interested in the decree (139 I. C. 151) ; application by next-friend after decree-holder's majority if bona-fide [(1930) Lah. 603] ; omission to mention appellate decree (9 Pat. 829) are not material. In cases of mortgage decrees, see (1934) Lah. 58.

O. 21 R. 15. In an application for execution by a joint decree-holder he need not state that it is made for the benefit of all, but the

court can impose conditions, (1930) Lah. 603; (1930) All. 188 : 122 I. C. 179. For the object of the rule, see (1932) Pat. 359 : 140 I. C. 393; 38 C. W. N. 163.

“Joint decree” covers a decree which has determined the rights of the several decree-holders, 11 Pat. 445.

For a large discretion of court, see 56 Mad. 316.

O. 21 R. 16. Notice of application for execution by assignee is necessary (1931) Lah. 690 : 133 I. C. 643; (1931) Mad. 192 : 131 I. C. 171.

The legal representative can continue the same application, 34 L. W. 866 F. B. (overruling 50 Mad. 1); see (1931) Bom. 423 : 134 I. C. 720.

The court must decide if the transferee is benamidar of one of the judgment-debtors, (1931) Lah. 545 : 131 I. C. 229.

Until recognition of assignment, the assignor can execute the decree, (1933) Sind 119. Assignee of part of decree cannot execute, (1934) Bom 59.

O. 21 R. 17. The executing court can allow amendments of the application, (1933) P. C. 68 : 142 I. C. 326. See 11 Pat. 508, 546; 59 Cal. 1266; (1932) All. 484 : 139 I. C. 201.

O. 21 R. 18 applies only where both the decrees are before the same court for execution [(1930) Lah. 508 : 126 I. C. 516; (1933) Mad. 215] and not between a preliminary and a final decree (57 Cal. 855). The provisions are exhaustive, (1932) Lah. 537 : 138 I. C. 285.

O. 21 R. 19 does not apply where the claims are not under one decree, (1930) All. 726 : 127 I. C. 525; (1930) All. 413 : 126 I. C. 831.

O. 21 R. 20. Under this rule money and mortgage decrees can be set off, 63 M. L. J. 722 : 140 I. C. 378.

O. 21 R. 22. On an application under R. 32, the court has power to issue (1) a notice under R. 22, (2) a notice to show cause why he should not be arrested, and (3) a warrant of arrest (58 Cal. 940).

For the need for a notice or recording reasons for dispensing with it, see 58 Cal. 825; 58 Cal. 940; 34 Bom. L. R. 987; (1931) Cal. 546 : 134 I. C. 80; (1931) Cal. 476 : 131 I. C. 702. Want of notice invalidates the sale, 11 Pat. 241. For a case of knowledge, see 11 Rang. 79.

O. 21 R. 24. For legality of warrant, see (1933) All. 46; (1932) All. 227 : 140 I. C. 118.

S. 55. For liability and discharge of surety, see (1931) Bom. 444 : 134 I. C. 718; (1930) Lah. 575 : 125 I. C. 324; (1932) Lah. 492 : 138 I. C. 198; (1933) Mad. 360; (1933) Lah. 89 : 141 I. C. 301; (1933) Mad. 309 : 141 I. C. 852.

For cases of insolvency, see (1933) Nag. 40.

Release of judgment-debtor under S. 55 (4) is optional, (1936) Lah. 736 : 128 I. C. 51.

Attachment. An attachment once raised on a claim is not revived by the success in a suit to set aside the order (8 Rang. 491; 5 Luck. 680.)

Pay or pension is due on the last day of the month (1930) Rang. 161 : 126 I. C. 643.

S. 60. The following are attachable: Rents and profits over which judgment-debtor has a disposing power, (1931) P. C. 160; interest in property sold before confirmation, (1931) Mad. 511 : 131 I. C. 14; interest of a residuary legatee (1931) Pat. 76 : 130 I. C. 163; Jaghir (1932) Mad. 417 : 137 I. C. 799.

Objection cannot be raised after sale, (1930) Lah. 106 : 121 I. C. 303; 40 All. 680; nor after waiver by the judgment-debtor, (1933) Lah. 251.

The following are not attachable: Benefit fund vested in trustees, (1931) Bom. 300 : 134 I. C. 558; property not voluntarily alienable 10, Pat. 582; pensions, (1931) P. C. 160 : 132 I. C. 727; contingent debt, (1931) Bom. 288 : 133 I. C. 248; contingent interest, (1931) Oudh 398 : 134 I. C. 602; gratuity of a railway servant, 11 Pat. 584; agriculturist's house in the village as well as hut in the field, 7 Rang. 766; (1933) Nag. 80 : 141 I. C. 824; cooking vessels meaning vessels needed for the cooking operations, 54 All. 399.

For 'agriculturist', see 12 Lah. 367 : 52 All. 1027; (1931) All. 20 : 132 I. C. 809; (1931) Nag. 8 : 130 I. C. 81. On the duty of court, see (1930) All. 727 : 127 I. C. 447; (1932) All. 499 : 138 I. C. 67; (1932) All. 508 : 138 I. C. 685 (case of successor).

For artisan (a soap maker), see 54 All. 399. For pay of army officers, see (1933) Bom. 185; (1933) All. 153.

S. 64. An attachment does not create a charge, (1930) Mad. 4; (1933) Mad. 342. An attachment is complete only when all that is prescribed has been done, 9 Pat. 860.

The section does not apply to an alienation not made after any attachment but only after an interim injunction, (1930) Lah. 858 : 128 I. C. 304. But the alienation is not void, 59 Cal. 1176; 10 Rang. 199; 63 M. L. J. 94 : 140 I. C. 600.

An involuntary transfer is not a private transfer, 63 M. L. J. 945 : 145 I. C. 600.

S. 66. For applicability of S. 66, see (1931) Bom. 578; 35 C. W. N. 940; (1931) A. L. J. 601 : 133 I. C. 536.

S. 68. For the effect of transfer to Collector for execution, see (1931) All. 320 : 133 I. C. 609.

S. 73. The following are assets: (1) Moneys paid to the sheriff in garnishee proceedings (57 Cal. 736); (2) Moneys paid into court by judgment-debtor for avoiding sale of property [54 All. 516; (1932) Nag. 156 : 140 I. C. 293].

For applicability of S. 73, see (1930) Sind 300 : 128 I. C. 686 (decree against judgment-debtors and others); (1931) Cal. 454 : 130 I. C. 227 (decrees against widow personally and against her as legal representative); 53 Mad. 670 (mortgage).

When attaching and custody court are same, see (1933) Mad. 342.

S. 73. On questions arising between rival decree-holders, there is no appeal, 55 Bom. 473; 134 I. C. 195.

In cases of set-off, notional receipt amounts to holding of assets, (1931) Bom. 252 : 133 I. C. 737. See also (1931) Pat. 405 : 134 I. C. 618; (1931) Pat. 359 : 133 I. C. 166.

S. 63, 73. For attachment by two courts, see (1931) A. L. J. 880 : 133 I. C. 426; (1931) Rang. 111 : 132 I. C. 832; (1931) Nag. 127 : 134 I. C. 273; 55 Bom. 473.

O. 21. R. 29. For an order of stay under Rule 29, see 58 Cal. 1113, (1931) Bom. 247 : 132 I. C. 507.

O. 21 R. 32. Decree for injunction can be enforced against legal representative, 55 Bom. 709 ; (1931) Bom. 482 : 134 I. C. 961.

For the object of the rule, see 56 C. L. J. 140.

O. 21 R. 35. For delivery of symbolical possession, see (1931) Cal. 427 : 131 I. C. 698 ; 132 I. C. 181.

O. 21. R. 37. Simultaneous issue of arrest and notice under this rule is illegal, 11 Pat. 743.

O. 21 R. 46. If a garnishee denies debt, the court cannot inquire into the truth of it [4 Rang. 100 ; 61 M. L. J. 863 ; (1931) Mad. 570], but can proceed under rule 63, if the garnishee applies under rule 58 [(1931) Bom. 288 : 133 I. C. 248]

For the locus of a debt, see (1933) P. C. 150. Mortgage debt is attachable as a debt under this rule, (1933) Rang. 61. As to power to seal up premises, see 11 Pat 493.

O. 21. R. 50. For execution of decrees against firms, see (1931) Lah. 507 : 131 I. C. 376; (1931) Sind 82 : 131 I. C. 712 ; (1931) Lah. 736 : 134 I. C. 1016 ; 141 I. C. 453.

For procedure in inquiry, see (1932) Bom. 375 : 140 I. C. 761. For partner disputing liabi-

lity, see (1932) Sind 199 : 140 I. C. 40 ; (1932) Bom. 516 : 140 I. C. 519 ; (1932) Bom. 375 : 140 I. C. 761. The court that passed the decree is the original court only, 11 Pat. 580.

O. 21. R. 52. For attachment of money in custody of court and jurisdiction of court having the deposit, see 44 Mad. '00 F. B ; 35 C. W. N. 517 ; (1933) Mad. 342.

For money in the hands of receiver, see 60 Cal. 345.

O. 21 R. 53. For procedure under rule 53 for attachment of decrees, see 58 Cal. 934 ; (1932) Pat. 349. Attachment under this rule is completed by the receipt of the notice prescribed in the court to which that notice is sent, 9 Rang. 140.

For applicability in mortgage suits, see 59 Cal. 1464.

O. 21 R. 57. An attachment before judgment does not cease by the dismissal of an application for rateable distribution or of an application to attach moveables not attached before judgment, 55 Bom. 693. See 47 Mad. 483 ; 31 Bom. L. R. 1101 ; 56 Cal. 416.

If the execution proceedings in the decree attached are pending, the dismissal of the application in which the decree is attached does not operate to cancel the attachment, (1931) Lah. 605 : 132 I. C. 667.

Under this rule, an attachment ceases to exist, on default of decree-holder (1930) Rang. 325 : 128 I. C. 591 ; (1930) Mad. 414 : 120 I. C. 863 (in spite of the order of court that it should

remain in force) ; (1930) Mad. 303 : 121 I. C. 845 (attachment before judgment).

O. 21 R. 58. For the scope of inquiry under rule 58, see (1931) All. 608 : 133 I. C. 318. For dismissal for delay, see 57 Bom. 213.

The court can deal with a claim even after the sale 61 M. L. J. 884. See however 6 Rang. 80; 3 Pat. 76; 16 C. W. N. 1029.

An objection by a judgment-debtor in another capacity as trustee falls under O. 21 R. 58; (1930) Nag. 293 : 128 I. C. 401.

O. 21 R. 63 applies when sale is ordered subject to a mortgage or lease, [(1930) Nag. 116 F. B.] and to any order passed, even on default of appearance, 11 Lah. 369.

For notice to receiver, see (1933) Mad. 340.

For valuation of suit, see (1932) Rang. 20 : 137 I. C. 54; (1933) All. 144 F. B.

In suits under O. 21 R. 63, the onus is on the plaintiff, (1933) All. 198; 55 Mad. 748; (1931) Lah. 383; (1931) Lah 430 : 133 I. C. 118 (representation of other creditors not necessary).

Even if the attachment is raised more than a year after the claim is disallowed, R. 63 does not bar the claimant's title, (1931) Lah. 74 : 131 I. C. 225; (1931) All. 608 : 133 I. C. 318.

For objection by garnishee, see (1931) Bom. 288 : 133 I. C. 248; (1931) Mad. 570.

O. 21 R. 65. An auction purchaser is not estopped from contesting the fact and validity of encumbrance, 11 Lah. 90; (1930) Oudh 362 : 126 I. C. 389.

O. 21 R. 66. On the need for stating value in proclamation, see 35 C. W. N. 907; 48 Cal. 813; 58 Cal. 577 (two valuations); (1932) All. 664 : 138 I. C. 612.

The proclamation must state that the property is subject-matter of a pending suit by a claimant, 61 M. L. J. 683 (dissenting from 41 Mad. 985).

Value of the property must be stated and must be fixed by the court, (1930) Cal. 781 : 127 I. C. 257; (1932) Cal. 576 : 139 I. C. 225; 37 C. W. N. 231; (1930) Nag. 191 : 124 I. C. 250. But omission is a mere irregularity, (1930) Lah. 685 : 121 I. C. 369.

For omission to specify date and hour of sale, see (1930) All. 542 : 124 I. C. 721.

O.21 R. 72-3. For order of set-off by decree-holder purchaser, see 53 Mad. 900; (1930) Mad. 103 : 130 I. C. 458; and the effect of it, see (1931) Mad. 103 : 130 I. C. 458.

For deficiency coming on re-sale, see (1933) Nag. 123 : 141 I. C. 367.

An order of set-off validly made cannot be set aside by a higher court, 55 Bom. 473. It impliedly dispenses with the need for a deposit of 25%, (1931) Lah. 78 : 131 I. C. 227. On a subsequent application for rateable distribution the court has got power to order a refund by process in execution, 10 Pat. 830; (1931) Pat. 405 : 134 I. C. 616.

R. 84-85. The court has absolute discretion in refusing to accept a bid, 58 Cal. 788. If by consent of parties, the balance of purchase

money is received after the due date, the irregularity is waived and the sale is good, 38 C. W. N. 877; 43 M. L. J. 477.

When does the sale become complete? See (1932) Lah. 525 : 138 I. C. 86; 9 Rang. 608.

O. 21 R. 89. Deposit with a prayer not to pay out without security is not valid, 53 Mad. 943; 35 C. W. N. 1056.

When properties are sold in separate lots a deposit sufficient to cover the price of the last item was held sufficient, (1930) All. 843 : 128 I. C. 818; but the judgment-debtor cannot ask for setting aside sale of some items only by paying their proportionate price only, 9 Pat. 310; see 36 L. W. 754 : 140 I. C. 582. Tender and readiness to deposit is sufficient, (1932) Pat. 342 : 140 I. C. 98. For mistake of court, see (1933) Rang. 104. Time cannot be extended by court, (1933) Rang. 8.

O. 21 R. 90. The following are material irregularities: omission to state land revenue, (63 M. L. J. 945 : 140 I. C. 600), mis-statement of area (11 Pat. 424), omission of incumbrance [(1932) All. 368 : 140 I. C. 499], absence of minor's representation [(1933) Mad. 179], mistake in proclamation [(1933) Mad. 225 : 64 M. L. J. 439], failure to proclaim [(1933) A. L. J. 73]; sale before 30 days [(1933) Lah. 186].

O. 21 R. 90. The following are not material irregularities: failure to sell properties in the order on the list, (1931) All. 159 : 130 I. C. 465; immaterial misdescription (1931) Bom. 367 : 134 I. C. 692.

On the power of auction-purchaser to apply under rule 90, there is a difference of opinion
Yes: 47 All. 479; (1931) Lah. 630 : 132 I. C. 525;
No: (1931) Sind 107 : 134 I. C. 373; (1929) Rang. 33.

Interests referred to in this rule are those independent of the sale, (1932) Lah. 468 : 138 I. C. 817. See 63 M. L. J. 945 : 140 I. C. 600.

To an application under R. 90, the purchaser is a necessary party, (1930) Nag. 5 : 121 I. C. 658; see contra 11 Pat. 504.

To set aside sale proof of substantial injury is necessary, (1930) Pat. 58 : 123 I. C. 637; (1931) Pat. 117 : 129 I. C. 661, 58 Cal. 813; 60 M. L. J. 423 P. C.

For cases of omission to mention value or to fix upset price, or of under-valuation, see (1930) Cal. 511 : 127 I. C. 264; 54 Bom. 348; (1930) Lah. 692 : 122 I. C. 234.

O. 21 R. 92. For purchaser's mistake, see (1932) All. 403.

O. 21 R. 93. For a right to a refund of purchase money in case of partial loss of property for want of judgment-debtor's title, see 53 All. 496; 50 Mad. 639.

For a right to refund of money, see 13 Lah. 618; 54 All. 948; see also (1932) A. L. J. 100.

There is no implied warranty of sale in execution proceedings, (1931) Nag. 116 : 134 I. C. 269.

For right of purchaser to recover price in the event of judgment-debtor's interest being found to be absent, see 5 Luck. 552 (caselaw discussed).

and 53 All. 496, 59 M. L. J. 232 : 128 I. C. 514 (no proportionate refund).

O. 21 R. 95-100. In Patna, an application to remove obstruction by the judgment-debtor is not appealable, 9 Pat. 775; see 54 Bom. 479.

Rules 100 and 101 apply to cases of joint possession also, 58 Cal. 55 (contra 17 Bom. 718).

Neither judgment-debtor [I. R. (1932) Lah. 658] nor an unsuccessful claimant (56 C. L. J. 250) can apply.

Symbolical possession under R. 100 puts an end to adverse possession and starts a fresh period, (1931) All. 234 : 124 I. C. 767; (1930) Lah. 823 : 126 I. C. 526; (1933) Cal. 144 : 142 I. C. 152. Rule 103 does not take away High Court's powers of revision, 58 Cal. 55.

For scope of rules 100, 101, and 103, see (1930) Pat. 416 : 127 I. C. 564; 56 C. L. J. 250; (1930) Cal. 348 : 127 I. C. 552; (1930) Bom. 375; (1931) Lah. 686 : 132 I. C. 844; (1931) Lah. 13 : 130 I. C. 520

Regarding the optional procedure under rules 95-6, there is no distinction between a decree-holder purchaser and a stranger purchaser, 10 Pat. 670 F. B.

O. 22 R. 8. Execution proceedings do not abate on the adjudication of decree-holder as insolvent and judgment-debtor cannot ask that proceedings should be dropped even if the Offl Recr. does not care to continue them, (1931) Lah. 205 : 125 I. C. 186.

If a decree-holder dies during pendency of execution petition, his legal representative can be substituted in his place to continue them under S. 146 and O. 21 R. 16, 34 L. W. 861 F. B. (overruling 50 Mad. 1); see 33 Bom. L. R. 818, 858.

O. 32 R. 5. Guardian ad litem appointed in suit continues in execution proceedings [(1930) Nag. 185 : 124 I. C. 247] and if he neglects his duties, one interested in the minor can apply to set aside an execution sale (*ibid*).

O. 41 R. 5. Sale held before the order of stay is communicated to the selling officer is not void, (1930) Lah. 17 : 125 I. C. 53.



INDIAN LIMITATION ACT . (1908)

S. 14 applies to execution proceedings, (1932) Lah. 531 : 138 I. C. 646; (1932) M. W. N. 1317 : 140 I. C. 270.

S. 15. For relation with S. 48, C. P. C., see (1932) Oudh. 246 : 137 I. C. 603; (1931) Oudh. 351 : 132 I. C. 257. For what is a stay, see (1931) Lah. 125 : 131 I. C. 345; 12 Pat. 195 P. C.

Art. 11. For suits under O. 21 R. 63, see (1932) Lah. 516 : 138 I. C. 412; (1930) A. L. J. 1322 : 130 I. C. 200; 57 Bom. 213; (1933) Lah. 75 : 141 I. C. 252, (1933) Lah. 449; (1933) M. W. N. 924.

For suits under O. 21 R. 100, see (1931) Lah. 686 : 132 I. C. 844; (1930) M. W. N. 1051.

For suit on an adverse order made under O. 21 R. 66, see 11 Lah. 369.

Art. 12. For applicability, see 14 Pat. L. T. 441.

Art. 137-8, 142-144. See 10 Pat. 670 F. B.

Art. 165 applies to applications under O. 21. R. 100, 58 Cal. 55.

Art. 166. For setting aside execution sales, see (1931) All. 145 : 130 I. C. 708; (1931) Lah. 586 : 132 I. C. 493; (1931) Oudh 291 : 132 I. C. 263.

For question of knowledge, see (1932) Cal. 627 : 140 I. C. 732. This has no application to void sales, 47 Mad. 288 F. B; (1930) Lah. 17.

Art. 177 does not apply to execution proceedings, 11 Pat. 546.

Art. 181. For application for revival of execution petition, see (1931) All. 458 : 133 I. C. 316; 58 Cal. 143; 60 Cal. 19; 54 All. 573 F. B; (1930) Cal. 319; (1930) Lah. 753; (1930) Mad. 303 : 121 I. C. 845. See 64 M. L. J. 664; (1933) Mad. 418 F. B.; to set aside sale, see (1931) Bom 446 : 133 I. C. 858; (1931) Lah. 586 : 132 I. C. 493; for restitution, see (1931) Oudh 51 : 130 I. C. 78; 35 C. W. N. 1294; but see (1931) M. W. N. 1006; for execution of conditional decrees; see (1931) All. 326 : 131 I. C. 559; (1933) Rang. 180; for relief under O. 21 R. 50 (2), see (1930) Sind 180 : 124 I. C. 392.

For relief against surety, see (1933) Oudh 209; (1933) Mad. 219 : 142 I. C. 368; (1933) Mad. 722.

Art. 180. For application by decree-holder auction-purchaser, see (1933) Cal, 311.

Art. 182. This Article is subject to S. 48 C. P. C, 54 All. 222. For mistake of court, see 56 C. L. J. 185.

For limitation of application against surety, see 63 M. L. J. 85; (1932) P. C. 131.

For instalment decree, see 141 I. C. 745.

In the case of appeal, see (1930) All. 636; (1930) Nag. 54 : 130 I. C. 148.

In the case of dismissal of appeal to Privy Council for want of prosecution, see 11 Pat. 477.

In the case of a dismissal of on irregular appeal, see 59 All. 283.

In the case of amendment of decree, see (1930) Pat, 286; 64 M. L. J. 401.

For review of decree, see 64 M. L. J. 75 : (1933) Mad. 276.

For decree for partition, see (1932) Cal 869 : 139 I. C. 786.

For the applicability of clause (5), see (1932) Oudh 148 F. B.; 12 Lah. 153 F. B.; (1931) Oudh 356 : 132 I. C. 798.

For "final decree", see (1933) Bom. 255.

"For final order", see (1933) Rang. 87 : 142 I. C. 435.

For the effect of amendment by Act 9 of 1927, see (1932) Oudh 148 F. B.; 63 M. L. J. 725 : 140 I. C. 500; (1930) Pat. 207.

For the meaning of 'step-in-aid', see (1932) A. L. J. 1035.

The following *are* steps in aid: an application against a dead judgment-debtor, 11 Pat. 546; an application against one only of two executors, 11 Pat. 508, an application not specifying mode of execution, (1932) Lah. 534 : 138 I. C. 249; an application returned and not re-presented, 11 Pat. 513; (1933) Mad. 568 : 143 I. C. 844.

Remittance by money-order of subsistence allowance to Jail Superintendent, 63 M. L. J. 792 : 140 I. C. 498; application slightly erroneous (1933) Rang. 87 : 142 I. C. 435; (1931) Oudh 312 : 132 I. C. 262; (1933) Sind 78 : 141 I. C. 489; application against wrong legal representative, (1931) Bom. 425 : 134 I. C. 699; application to execute attached decree, (1931) Lah. 705 : 132 I. C. 667; judgment-debtor's application under O. 21 R. 2, and decree-holder's appearance to contest, (1930)

Cal. 304; (but see 64 M. L. J. 345); application for transfer of decree, (1933) Sind 78 : 142 I. C. 489; (1933) Oudh 131; application against minor with deceased guardian, 37 C. W. N. 752; an application for precept, (1933) A. L. J. 902.

The following *are not* steps-in aid : application to transfer decree to court not having Jurisdiction, 11 Pat. 785; an application for delivery of possession, 11 Pat. 513; an application not in accordance with law, (1931) Nag. 154 : 134 I. C. 681 F. B.; (1931) Bom. 128 : 129 I. C. 159 (no description of property); 61 M. L. J. 516 (not signed and verified); (1931) All. 722 : 131 I. C. 33; an application by decree holder for extension of time for paying compensation for improvement, 59 M. L. J. 579; a certificate of payment, (1933) All. 364; (1930) All. 461; (1930) Oudh 504 : 128 I. C. 788; a verbal application to amend, (1930) Cal. 304; an application for extension for applying for substituted service, (1933) M. W. N. 352; mere drawing out of money, (1933) Mad. 597 : 144 I. C. 66; an application omitting material particulars, (1933) M. W. N. 919; (1933) Sind 341; a mere application by assignee of decree for recognition, (1933) Sind 341; an application to court not having jurisdiction, 37 C. W. N. 1167; an application for incompetent relief, 10 Pat. 183; (1931) Sind 160 : 134 I. C. 1182 (see 54 Mad. 852); a memo for return of sale papers, (1931) M. W. N. 413; 41 Mad. 251; an uncertified payment by one judgment-debtor only, (1933) Sind 674.

For an application for leave to bid as step-in-aid, see 12 Lah. 153 F. B; 53 Mad. 390.

Question of good faith is irrelevant, (1931) Sind 150 : 134 I. C. 1182; 131 I. C. 68; (1930) All. 814.

For meaning of "in accordance with law" see (1933) Sind 341.

Art. 183. See 11 Pat. 445.

In the case of absence of territorial jurisdiction, see 58 Cal. 832.

For provision for acknowledgment, see 10 Pat. 213, and for 'secured by decree', see *ibid*.

This is not controlled by s. 6, 7 & 8, (1930) Pat. 141 : 123 I. C. 411.



SUPPLEMENT—(Contd.)

VOL. II.

S. 50. Where judgment-debtor applies pending execution (1937) Pat. 239: 168 I. C. 346. Sale without L. R. of J. Dr. is void, 59 Mad. 461 F. B. 'Dies' does not include civil death, (1935) Cal. 713: 159 I. C. 372.

S. 51. Choice of mode, (1936) Pesh. 46: 160 I.C. 812. Appointment of Receiver—40 C. W. N 1065; (1936) Nag. 288 (service inam lands).

S. 52-3. Scope of, 14 Pat. 732; (1935) Lah. 650: 159 I. C. 233; 158 I. C. 490.

Joint Hindu family, (1937) Oudh 327: 168 I. C. 268; (1937) Mad. 610 F. B.; (1934) Lah. 101: 148 I. C. 930; (1934) All. 590: 150 I. C. 411 F. B.; 58 Bom. 218; (1934) Lah. 438. Decree against legal representatives—(1934) Rang. 196.

Assets in the hands of legal representatives, (1936) Lah. 236: 165 I.C. 802; (1935) All. 390: 157 I.C. 51; (1934) Lah. 106: 148 I.C. 980; 12 Rang. 603; (1934) Rang. 93: 148 I. C. 1092.

S. 55. Security bond Construction of—14 Rang. 190; (1936) Sind 244; (1936) Mad. 963: 165 I. C. 864; (1935) Mad. 543: 156 I. C. 113; (1934) Lah. 967: 151 I. C. 154,

S. 60. Section mandatory, (1935) Lah. 942;

Money left with vendee of J, Debtor, 39 P.L.R. 201. Pay of Asst. Surgeon, Military Department (1936) A. L. J. 1291: 167 I. C. 179 F. B. Occupancy-right, 14 Rang. 619; (1937) Lah. 211; (1934) Lah. 881.

Pronote in the name of 3rd person, 58 Mad. 693 F. B.

Agriculturist, 58 Bom. 564; (1937) Lah. 200; (1937) Mad. 551 F. B.; (1936) Lah. 737: 164 I. C. 691; (1936) Pesh. 151: 163 I. C. 621; (1935) Pat. 496: 158 I.C. 59; (1935) All. 242: 153 I.C. 511; (1934) Lah. 168 (two houses); (1934) Lah. 680: 149 I. C. 28.

Jagiris Pension, (1937) Lah. 178; (1937) Nag. 202; 38 P. L. R. 531.

'Future maintenance', (1937) Nag. 202; (1936) Lah. 944; 17 Lah. 378; 158 I. C. 710; (1935) Nag. 133; 156 I. C. 65; (1935) Mad. 815; 158 I. C. 170. Arrears, 62 Cal. 404.

Residence, (1936) Lah. 830; 165 I. C. 519; (1935) Mad. 848; 157 I. C. 853.

Personal service, (1936) Pat. 10; 160 I. C. 355.

'Artisan', (1935) All. 488; 158 I. C. 623. Mere right to sue, (1935) Nag. 135; 157 I. C. 587; (1936) Rang. 218; (1935) Sind 21; 154 I. C. 580 (preliminary decree for accounts) Provident Fund, 15 Pat. 779; (1936) Lah. 694; 165 I. C. 767; (1935) Bom. 396; (1934) Lah. 153; 150 I. C. 213.

Mutual benefit fund, 70 M. L. J. 581 Contingent interest, (1936) Pesh. 90; 161 I. C. 628; (1936) Sind 65; 163 I. C. 256; (1936) Cal. 8027. Right to receive temple offerings—58 All. 457.

S. 63. Scope of (1936) Cal. 723. With S. 73, 61 Cal. 240; (1937) Nag. 80; (1937) Cal. 55; (1936) Cal. 723; (1936) Nag. 270; 59 Mad. 1028; (1935) Mad. 938; 59 Bom. 310.

S. 64. Scope of, 13 Pat. 446; (1937) Nag. 13; 167 I. C. 48; (1937) Pat. 50; 166 I. C. 873; (1936) Nag. 163; 39 C. W. N. 1076; (1935) Mad. 872; 158 I. C. 940; (1934) All. 902; 152 I. C. 759; (1934) All. 1057. Effect of, 164 I. C. 1037.

S. 66. Scope of, 61 Cal. 440; 61 Cal. 371; 62 C. L. J. 88; (1934) All. 990. Certified purchase (1937) All. 176; 167 I. C. 683; (1937) Mad. 362; (1936) All. 750; 165 I. C. 709.

S. 72. Transfer to Collector, (1936) Pesh. 90; 161 I. C. 628; (1936) Lah. 696; (1936) Pesh 14; 163 I. C. 571.

S. 73. Application pending, (1936) Mad. 437; 163 I. C. 209; (1936) Lah. 519; 163 I. C. 59; 69 M. L. J.

903 (application returned and represented.) Scope of inquiry—62 Cal. 715 F.B. Applicability—(1937) Pat. 92: 167 I. C. 613; (1937) Nag. 16: 168 I. C. 158; (1934) Nag. 243: 151 I. C. 1027.

Crown debts—59 Mad. 872.

'Assets'—13 Pat. 446; (1937) Nag. 80.

'Same judgment-debtor'—(1936) Mad. 123: 160 I. C. 559; (1937) Mad. 253: 167 I. C. 503; (1936) Mad. 948: 165 I. C. 664; 63 Cal. 923; (1935) Mad. 399: 156 I. C. 631; 69 M. L. J. 711 F. B.; (1935) Cal. 738: 159 I. C. 575.

Appeal—(1936) Lah. 181: 162 I. C. 309; (1936) Pesh. 52: 160 I. C. 893; 59 Mad. 399.

Two Courts—(1934) Lah. 123; (1934) Oudh 110: 147 I. C. 1071,

O. 21 R. 5. Decree not transferred through District Court—164 I. C. 917; (1936) Pat 785: 164 I. C. 693.

O. 21 R. 15. Joint decree-holder—(1937) Pat. 253: 62 C. L. J. 560; (1935) Lah. 484: 157 I. C. 482; (1935) Nag. 25: 156 I.C. 1003; 57 Mad. 696 (partners); 58 Bom. 428.

O. 21 R. 16—Scope of, (1937) Bom. 365; (1935) Bom. 331: 159 I. C. 338. 'Assignment'—(1936) Mad. 543; 59 Bom. 417. 'In writing'—(1934) Lah. 328. 'Benami'—(1934) Mad. 471: 149 I. C. 122. Official Liquidator not an assignee—(1931) Lah. 152: 161 I. C. 662. And S. 146—(1937) Pesh. 18: 167 I.C. 555. Forum for application—(1934) Lah. 648; (1934) Pat. 9.

O. 21 R. 17—(1935) Mad. 161: 155 I. C. 327 (against wrong Lr.);

O. 21 Rr. 18-20. Principle, 16 Pat. 127 P. C. Scope of, R. 18 (1937) All. 422; (1936) All. 634: 162 I.C. 299; (1935) Lah. 914; (1934) Cal. 820: 152 I. C. 889; (1934) Bom. 307. Set off, inherent powers of, (1936) Cal. 409; (1936) Cal. 626: 165 I. C. 484; 39 C. W. N. 106.

O. 21 R. 22. Sale without legal representative is void, (1936) Mad. 205 F B., Want of proper notice, (1935) Cal 356: 154 I. C. 299; (1935) Rang. 42: 155 I. C. 959; 13 Pat. 467.

O. 21 R. 29. Stay of execution, 13 Rang. 351.

O. 21 R. 32. Restitution of conjugal rights, (1937) Rang. 126; (1935) Mad. 413: 156 I. C. 814. Injunction, (1936) Mad. 706: 164 I. C. 668. Disobedience, (1935) All. 480: 154 I.C. 744; 150 I.C. 307.

O. 21 R. 35. Symbolical possession, (1936) All. 85: 160 I. C. 1037; (1936) Pesh. 7: 160 I.C. 441; (1935) Lah. 612. 2nd application, (1934) Cal. 793: 152 I. C. 764. Suit for possession, (1936) Lah. 749,

O. 21 R. 46. Attachment of debt, (1934) Pat. 619: 152 I. C. 795. Garnishee denying debt, (1936) Nag. 218; 59 Mad. 966; (1934) Lah. 560: 151 I.C. 629; 'Payment', (1936) Mad. 251: 161 I. C. 473. Debt payable outside India, (1934) Sind 135: 151 I. C. 879; (1934) Nag. 167: 148 I. C. 176.

O. 21 R. 40. Arrest, 13 Rang. 623; (1935) Oudh 57: 153 I. C. 506; (1934) Lah. 166; (1934) Lah. 217.

O. 21 R. 50. Inquiry under, 41 C. W. N. 566; 62 Cal. 833; 14 Pat. 857. Partner, legal representation of, (1936) Sind 211: 165 I. C. 826.

O. 21 R. 53. Termination of attachment, 15 Lah 910; (1935) Mad. 212: 156 I. C. 312 (petition closed); (1934) Nag. 83: 148 I. C. 196 maintenance decree).

O. 21 R. 54. Process of attachment, (1936) Rang. 483: 164 I. C. 1044; 40 C. W. N. 1338; 16 Lah. 378; (1934) P. C. 217: 151 I. C. 221: 152 I. C. 630; (1934) Rang. 207: 151 I. C. 337.

O. 21 R. 55. Scope of, 13 Pat. 446.

O. 21. R. 57. 'Default'—(1934) Lah. 395: 150 I. C. 1053; 67 M. L. J. 861; (1934) Lah. 697; 40 L.W. 263;

O. 21. R. 58. Claims, Scope of inquiry, 14 Rang. 516; 58 Mad. 936; (1935) Mad. 134: 157 I. C. 1104. Inquiry after sale, (1937) Cal. 390; (1935) Rang. 212: 158 I. C. 353; (attachment before judgment). And S. 47, 58 Bom. 513; (1935) All. 183: 153 I. C. 517.

Appeal, 57 Mad. 822. Revision, (1936) Pesh. 185: 164 I. C. 1012. Order does not interrupt absolute possession, 44 L. W. 617.

O. 21 R 63. Final order under 158 when final, (1937) Nag. 170; (1935) Mad. 544: 156 I. C. 880 (claim withdrawn), 138 I. C. 334 (too late); 56 All. 537; 60 Cal. 1406 (suit on different basis). Burden of proof, (1937) Pat. 76: 167 I. C. 118; (1936) Mad. 971: 165 I. C. 620; (1937) Nag. 9; (1937) Rang. 252; (1936) Lah. 72: 162 I. C. 495; 17 Lah. 668; 17 Lah. 467. Parties, (1937) Rang. 249; (1936) Rang. 56: 161 I. C. 950; (1934) Mad. 587; Frame of suit, 14 Rang. 89; 12 Rang. 670. Limitation, 165 I. C. 84; (1934) Mad. 318: 156 I. C. 906; (1935) Mad. 596: 156 I. C. 878; (1935) Pat. 231: 157 I. C. 309; (1935) Rang. 207: 157 I. C. 507.

O. 21 R 66. Scope of, (1936) Mad. 70; 40 C. W. N. 28; 63 Cal. 621; (1935) Cal. 614: 158 I. C. 556; (1935) Bom. 331: 159 I. C. 358; (1934) Mad. 259: 150 I. C. 1134.

O. 21 R. 69. 'Adjournment', 18 Pat. L. J. 326; (1935) Lah. 694; (1935) Mad. 295: 156 I. C. 492; (1935) All. 182: 153 I. C. 410.

O. 21 R. 71 'Decree-holder', (1936) Oudh 277: 163 I. C. 175.

O. 21 Rr. 72-3. Leave to bid and set off, (1935) Mad. 421: 156 I. C. 949; 59 Bom. 310; (1934) Pat. 345: 150 I. C. 757 (not bound to bid for upset price).

O. 21 R. 83. Leave for private alienation, (1935) Lah. 481.

O. 21 R. 84, (1934) Pesh. 25: 148 I. C. 1082; (1934) Pat. 329: 150 I. C. 733; (1934) All. 817: 148 I. C. 348; (1934) Oudh. 429; 151 I. C. 310. Resale, (1937) A L. J. 495; (1935) Pesh. 123: 157 I. C. 748.

O. 21 R. 89. Scope of, (1937) Mad. 270; (1937) Nag. 161; 58 Mad. 972 F. B.; (1935) Lah. 423: 156 I. C. 965; 13 Pat. 641; 9 Luck. 393. Interim receiver can apply, (1937) Mad. 589; so also a mortgagee, (1936) Lah. 561; (1936) Oudh 128: 159 I. C. 1044; but not subsequent purchaser, 161 I. C. 424.

O. 21 R. 90. Amendment of, 1937) Pat. 260; 19 M. L. J. 282. Scope of, (1936) Lah. 969: 163 I. C. 765; (1935) Lah. 390: 158 I. C. 167. Irregularity—(1937) Pat. 104: 167 I. C. 63 (day of sale); (1937) Lah. 113 (deposit of 25% too late); (1936) Lah. 565 (sale closed in fall of bids); (1936) Rang. 327: 164 I. C. 202 (false representation); (1937) Pat. 493; (1935) Lah. 967 (want of notice under R. 66); (1934) Pat. 186: 147 I. C. 621; (1935) Mad. 459: 157 I. C. 251; (1936) Bom. 331: 159 I. C. 358 (undervaluation); (1935) Lah. 922 (sale before 30 days); 58 Bom. 564 (absence of attachment); (1934) Lah. 413: 148 I. C. 135 (defective plan); 58 Bom. 564; (1934) Pat. 379: 150 I. C. 737 (rent not mentioned); 13 Pat. 467 (no service of notice); 58 Bom. 564 (sale before time); (1934) Pat. 540: 152 I. C. 259 (two valuations). 'Person interested'—60 Bom. 750; 63 C.L.J. 560; (1935) Mad. 459: 157 I. C. 251; 14 Pat. 436; 58 Bom. 564; (1934) Cal. 477: 157 I. C. 219. 'Substantial inquiry'. 59 Mad. 438.

Proviso, construction of, (1935) Mad. 459: 157 I. C. 251.

O. 21 Rr. 91-93. Scope of, 16 Pat. 196; (1936) Lah. 497; (1935) Ali. 910: 157 I. C. 343; (1935) All. 889: 156 I. C. 389; 69 M.L.J. 750 F.B. Refund, (1935) All. 470: 157 I.C. 33. And Rule 95—61 Cal 945 P.C.

O. 21 R. 94. Certificate to assignee of auction-purchaser, (1936) Bom. 137: 161 I. C. 740.

O. 21 R. 95-97. 58 Mad. 893. Beneficiary and executor, (1937) Cal. 301; (1934) Pat. 119: 148 I. C. 905 (when house locked); (1934) Cal. 754: 152 I. C. 433 (if with structure on). Tenant, (1936) Mad. 733. And S. 144, 13 Pat. 108.

O. 21 R. 100. Scope of, (1937) Mad. 366: 167 I. C. 199; (1937) Pat. 136: 165 I. C. 986; (1937) Cal.

88; (1937) Oudh 400: 168 I. C. 919; (1935) Pat. 253: 155 I. C. 93; (1935) Oudh 462: 155 I. C. 1082; (1935) Mad. 309: 157 I. C. 1069 ;

O. 21 R. 103. Scope of, 45 L. W. 558; (1935) Sind 129: 156 I. C. 102; 77 Mad. 670; (1934) Lah. 457: 148 I. C. 731.

O. 41 R. 5. (1934) Lah. 361: 150 I. C. 985; (1934) Nag. 160: 150 I. C. 59; 15 Lah. 282 (bond); (1934) Mad. 709; 'Substantial loss', (1934) Nag. 160: 150 I. C. 59. Appeal, 58 Bom. 485.

Limitation Act.

S. 14. Scope, (1936) Cal. 400: 165 I. C. 756; (1937) Mad. 357 (covers-execution-proceedings also), (1934) Mad. 599: 152 I. C. 519; (Or. 21 R. 89-90.) S. 15. Stay, 62 Cal. 66: 39 C. W. N. 1030; (1935) Mad. 352. S. 18. Execution sale, (1936) P. C. 309: 164 I. C. 337; (1935) Cal. 779.

Art. 11. Claim suit, 40 C. W. N. 146; (1935) Cal. 500: 157 I. C. 688; (1935) Mad. 544; (1935) Mad. 328; (1935) Lah. 1042: 159 I. C. 603; (1934) Pat. 580: 152 I. C. 297 (attachment before judgment). Art. 11-A, (1935) Cal. 287: 155 I. C. 702.

Art. 166 is a general provision—45 L. W. 486; (1934) Lah. 875; (1936) Pat. 558; (1934) Mad. 593: 152 I. C. 519; (1934) All. 314: 151 I. C. 244 (Or. 21 R. 89-90) and Art. 181, (1937) Rang. 126; (1936) Pat. 486: 163 I. C. 84. Art. 174. 152 I. C. 763. Art. 177. (1934) Mad. 664: 151 I. C. 777.

Art. 181. 13 Pat. 411 (restitution); (1936) Sind 11; (1935) Lah. 166: 153 I. C. 5 (execution against surety,) (1935) Lah. 174: 158 I. C. 489; and Art. 182 (1935) Mad. 926: 158 I. C. 907; (1935) Lah. 911: 157 I. C. 679; and Art. 166 (1935) Lah. 972.

Art. 182, 58 Mad. 760.

'Appeal', 57 Mad. 741 F. B.; 15 Lah. 267; (1937) Mad. 385 F. B.; (1937) Pat. 337; (1936) Bom. 162: 162 I. C. 223.

'Amendment', 16 Pat. 453; (1937) Pat. 316: 167 I. C. 134; (1936) Mad 434: 161 I. C. 969 (beyond 3 years of decree); 57 Mad. 795 F. B.

'In accordance with law', (1937) Sind 108; (1937) Mad. 385; (1937) All. 397; (1937) Pat. 522; (1936) Pat. 67: 159 I. C. 494; 14 Rang. 550; (1935) Lah. 1: 153 I. C. 955; (1935) Mad. 786: 158 I. C. 891 (without vakalat);

'Final Order'. (1937) Cal. 16; (1937) Mad. 385 F. B.; (1936) All. 820 F. B.; (1935) All. 757: 154 I. C. 718; (1935) All. 909: 157 I. C. 273; 58 Mad. 1109;

Execution against sureties. 58 Mad. 276; (1937) Cal. 452; (1935) Lah. 465: 157 I. C. 488 F. B.

'Proper Court', 59 Mad. 257; (1935) Oudh 430: 155 I. C. 808; 13 Pat. 1; (1935) All. 259: 157 I. C. 1052—payment made out of Court.

182 (2) and (3). distinction between, (1937) Pat. 337. 182 (5). 60 Cal. 1357; (1934) P. C. 14: 147 I. C. 323. 182 (4). Scope of—16 Pat. 453; 57 Mad. 795. 182 (7). (1935) Oudh 465: 156 I. C. 764 F. B.; (1935) Mad. 107.

'Step in aid'. Test of, (1937) Lah. 404; (1936) Pat. 313: 162 I. C. 984; (1936) All. 369: 163 I. C. 231 (application for transfer of decree); 16 Pat. 288 (order transferring execution); (1935) Cal. 640: 158 I. C. 590.; (1936) Pat. 369: 163 I. C. 231; (1935) Mad. 161: 155 I. C. 327 (against deceased person etc.); 9 Luck. 288 (application for search in sub-registrar's office); (1934) Mad. 710 (Batta paid); (1934) Bom. 266: 151 I. C. 767 (oral application to inquire into L. R.); 58 Mad. 808 (pending application not necessary.)

182. Expl. I. (1937) Oudh 351: 168 I. C. 600; (1934) Lah. 637; (1934) Pesh. 40. 152 I. C. 443; (1934) Rang. 101: 149 I. C. 98. Expl. II—57 Mad. 808.

'Date of applying'—(1934) P. C. 14: 147 I. C. 323.

Art. 183. Revivor, 15 Pat. 102

DEPARTMENT OF LAW
LIBRARY
UNIVERSITY OF KASHMIR.

NO. 2122 DATE

20/2/2020

